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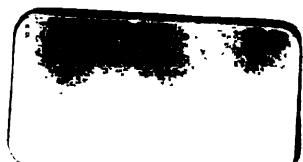
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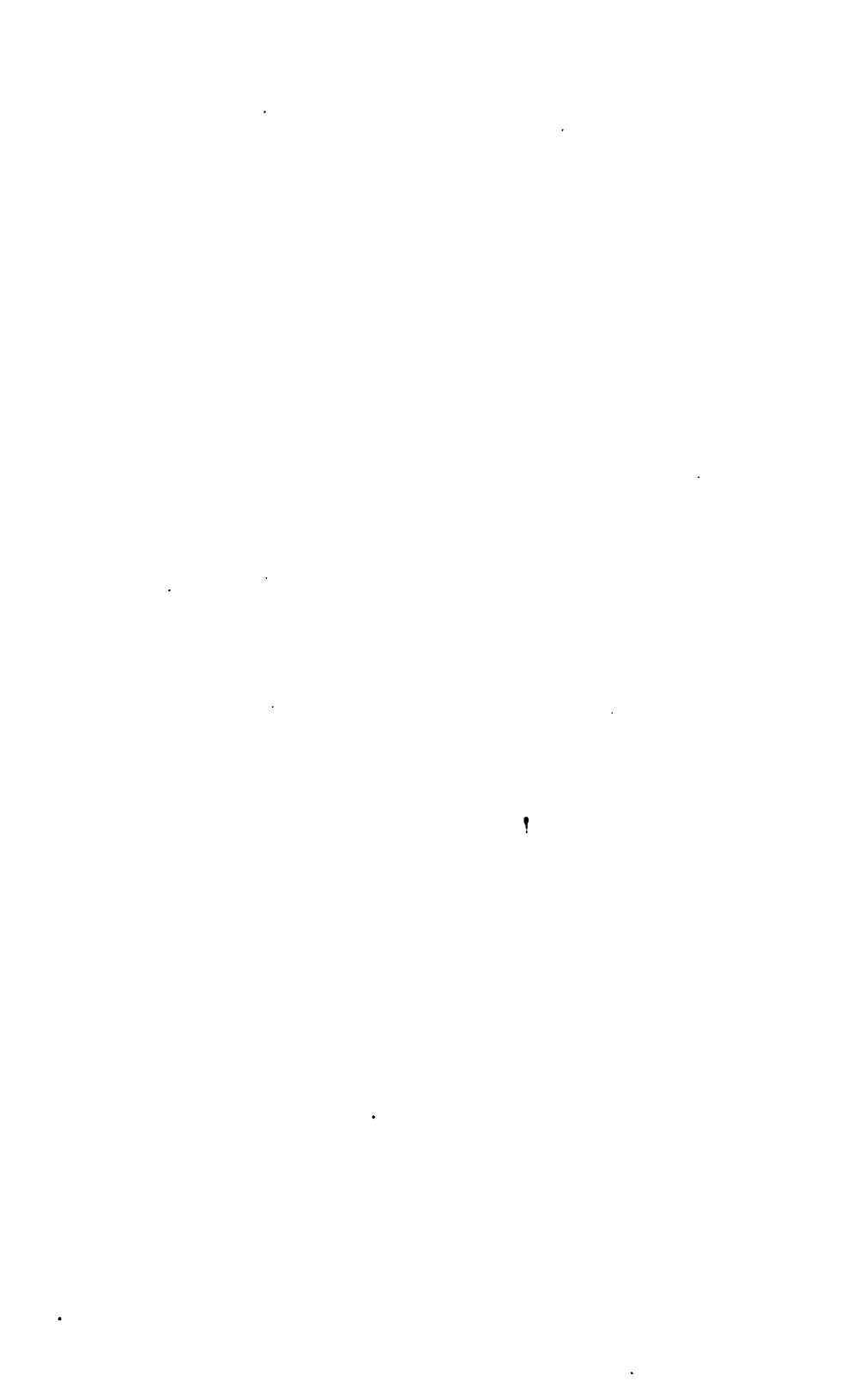
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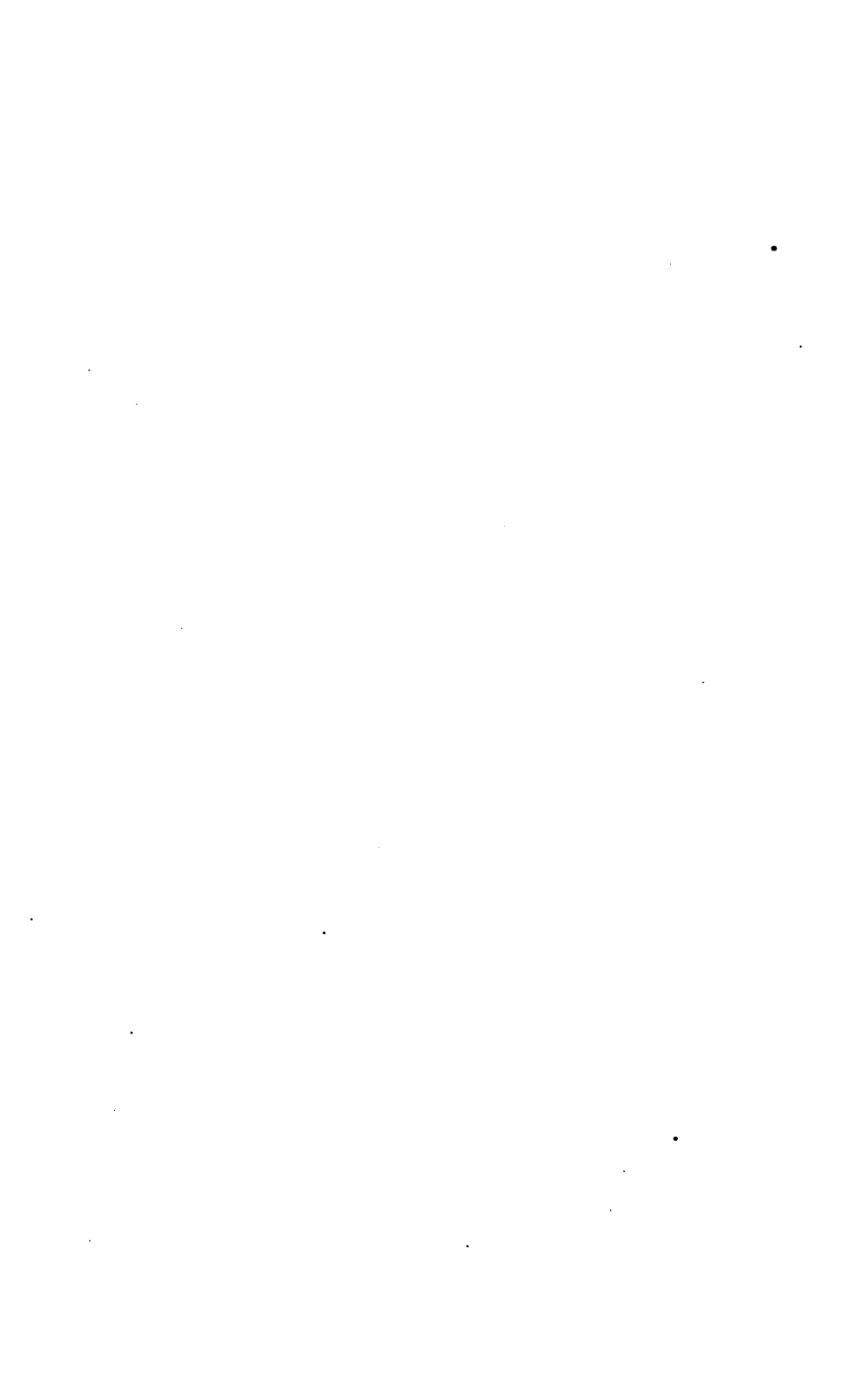
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THE
AMERICAN LAW REGISTER.

JANUARY 1886.

CITIZENSHIP.

I. CHILDREN born in the United States of alien parents are citizens of the United States.

II. Children born abroad of American parents are aliens.

These are general rules subject to very few exceptions. And these exceptions rest upon principles which are in harmony with the principles upon which the general rules are based.

I. The subject of citizenship is practically a national one. Each nation must necessarily determine for itself who are and who are not its citizens. And when it has so decided, its decision is authoritative within its own territory, and conclusively binding upon every department of its government and upon every one charged with the execution, or affected by the operation of its laws.

It is true that when a citizen goes abroad he is without the jurisdiction of his own nation, and within the jurisdiction of other nations, and subject to their laws. And consequently, when the laws of his own country are not in harmony with those of his foreign residence, conflicting claims may cause complication between the two nations, and create international questions which may call for diplomatic adjustment, or result in war. Yet in all such complications, each nation asserts its own law and recognises no superior authority.

Under our law the child of British parents, born in the United

States is a citizen of this country. Under the common law the same child is a subject of Great Britain. Under the law of France, children born in that country of alien parents, are aliens. Consequently while the allegiance of a child born in this country of English parents is claimed by both nations, the allegiance of a child born in France of American parents is claimed by neither nation. There is no tribunal having authority to settle such conflicting claims, and no law binding upon the nations asserting such claims. The question of citizenship involves practically and almost exclusively the reciprocal obligations of a nation and those who claim or are claimed to be its citizens. So long as a person remains in a country, it is a matter of no consequence to other nations whether or not he be accorded the rights of citizenship in the place of his residence. It certainly could give no offence to France if all the rights, privileges and immunities of American citizenship should be given to one claimed to be a subject of France while he is domiciled in the United States. But even when the citizen goes abroad his citizenship depends upon national laws. The nation that he looks to for protection will give or withhold it, so far as his right to it is supported by its own laws, regardless of the laws of other nations or of any supposed conflicting law of nations.

If, then, there is any law of the United States declaring who are citizens, that is the law and the only law for us. The constitution of the United States has clearly and authoritatively defined citizenship of the United States. The Fourteenth Amendment provides that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States, and of the state wherein they reside. Assuming this to be the supreme law of the land we need look no farther, but must confine our inquiry to the ascertainment of the meaning of this law. Citizenship with us must rest upon birth or naturalization. Naturalization is regulated by Congress, and depends upon legislation, which may at any time be altered at the discretion of Congress. But citizenship founded on birth is recognised and guaranteed by the constitution, and is not subject to and cannot be affected by legislation.¹

But birth alone in this country does not constitute citizenship of the United States. To entitle one to citizenship with us he must

¹ This is the reason why no reference is made in the article to sects. 1992 and 1993 of the Revised Statutes; nor to any previous legislation of Congress.

not only be a native, but he must also have been at the time of his birth "subject to the jurisdiction of the United States." When is a person subject to the jurisdiction of the United States? The Fourteenth Amendment was prepared by able lawyers and statesmen, and was critically examined and thoroughly considered before it was submitted for ratification to the several states. It was certainly their purpose to make an accurate, comprehensible and certain definition of that citizenship to which they were about to attach as incidents the most valuable rights, privileges and immunities. It was reasonably to be expected that these lawyers and statesmen would use language which was familiar to lawyers and statesmen, and which had acquired an accurate meaning, and would convey no uncertain sound. And they did so. They have used words of no unusual sound or uncertain import. The word jurisdiction means authority, power, potential authority, actual power. The jurisdiction of a nation extends so far, and only so far, as its authority prevails, its power is exerted and its laws operate.

The authority of a nation is co-extensive with its territory. The authority of a nation is limited to its territory. The authority of a nation is exclusive and supreme over persons and property within its own territory.

In his work on the Conflict of Laws, No. 2 (ch. 2, secs. 17-20, 29-31), Judge STORY says, "before entering upon any examination of the various heads which a treatise upon the conflict of laws will naturally embrace it seems necessary to advert to a few general maxims or axioms, which constitute the basis upon which all reasonings on the subject must necessarily rest." And these "general maxims or axioms" are stated by him as follows: "The first and most general maxim or proposition is that which has been already adverted to, that every nation possesses an exclusive sovereignty and jurisdiction within its own territory. The direct consequence of this rule is that the laws of every state affect and bind directly all property, whether real or personal, within its territory, and all persons who are residents within it, whether natural-born subjects or aliens, and also all contracts made and acts done within it."

"Another maxim or proposition is that no state or nation can by its laws directly affect or bind property out of its own territory, or bind persons not resident therein, whether they are natural-born subjects or others."

And the same author says on this subject, "Huberus has laid down

these axioms, which he deems sufficient to solve all the intricacies of the subject. The first is, that the laws of every empire have force only within the limits of its own government, and bind all who are subjects thereof, but not beyond these limits. The second is, that all persons who are found within the limits of a government, whether their residence is permanent or temporary, are to be deemed subjects thereof. The third is, that the rulers of every empire from comity admit that the laws of every people in force within its own limits ought to have the same force every where so far as they do not prejudice the powers or rights of other governments or their citizens. * * * Indeed, his first two maxims will in the present day scarcely be disputed by any one ; and the last seems irresistibly to flow from the right and duty of every nation to protect its own subjects against injuries resulting from the unjust and prejudicial influence of foreign laws, and to refuse its aid to carry into effect any foreign laws which are repugnant to its own interests and policy."

If these be universally recognised principles of law governing the conduct of nations, the framers of the Fourteenth Amendment, who were familiar with them, must have had them in mind in preparing the amendment, and selected their language with immediate reference to these fundamental maxims.

Having in mind then these general maxims and that the laws of the United States were supreme and exclusive within the territory of the United States, and their force and operation co-extensive with that territory, and bound "all persons who are resident within it, whether natural-born subjects or aliens," they used the language of the Fourteenth Amendment advisedly, and intended to extend the rights of citizenship to all persons who at their birth became subject to the authority and laws of the United States. It might be pertinently asked, if all persons born within the territorial limits of the United States became *ipso facto* "subject to the jurisdiction thereof," what was the necessity or propriety of using in this definition of citizenship two equivalent expressions "born in the United States" and "subject to the jurisdiction thereof." The reason was that the framers of the Fourteenth Amendment were aware that there were certain well known and universally recognised exceptions to the rule of territorial jurisdiction and supremacy, which rendered the qualification "subject to the jurisdiction thereof," necessary to an accurate complete definition.

For example, a foreign minister actually resident within the ter-

ritory of the United States is considered to be and remain within the territory of his own state, subject to the laws of his own country, both with respect to his personal status and his rights of property. He is, therefore, in no respect subject to the jurisdiction of the United States, though within the territory of the United States. And the same fiction of extra-territoriality attaches to and fixes the national status of his children born in the United States, who are in theory born upon the soil of the sovereign whom the parent represents.

Again, alien parents, acting under the authority of their own sovereign and in hostility to the nation in whose territory they may be at the birth of their children, are not subject to the jurisdiction of the invaded country. And children born under such circumstances are born subject to the jurisdiction of the country to which their parents belong. National vessels in a foreign port are not regarded as within the territory of the nation in whose harbor they may be, and their crews are everywhere subject to the jurisdiction of the sovereign to which they belong. Consequently, children born on such vessels are native-born subjects of the nation whose flag these vessels carry. Since the adoption of the Fourteenth Amendment, our courts have recognised other exceptions to or qualifications of the general rule. But in all of them the child born in the United States was not at the time subject to the complete jurisdiction of the United States.

The Supreme Court of the United States (*Elk v. Wilkins*, 112 U. S. 94), has held that an Indian born in the United States, but being at the time of his birth a member of one of the Indian tribes, which still exists, and is recognised as a tribe by the government of the United States, was not at the time of his birth "subject to the jurisdiction of the United States," in the sense in which those words are used in the Constitution, as those words were intended to embrace those only who were subject to the *complete* jurisdiction of the United States, which could not be properly said of Indians in tribal relations." Two of the justices of the court dissented, not on the ground that the Indian whose citizenship was denied had been born "subject to the jurisdiction of the United States," but because he had since severed all connection with his tribe, and was residing in good faith outside of Indian reservations, and within one of the United States.

In another case (*McKay v. Campbell*, 2 Saw. C. C. Rep. 118),

decided since the adoption of the Fourteenth Amendment, in the District Court of the District of Oregon, it was held that the child of a British subject, born in Oregon during the joint occupation of the country under the convention between the United States and Great Britain, was not a citizen of the United States, not because his father was an alien, but because he was not born subject to the jurisdiction of the United States. The court held that although the territory was ultimately conceded to belong to the United States, yet during such joint occupation "the country as to British subjects therein was British soil, and subject to the jurisdiction of the king of Great Britain, but as to citizens of the United States it was American soil, and subject to the jurisdiction of the United States."

The national allegiance of the parent does not, *per se*, in any respect affect the *status* of a child born in the United States. Such a child is born "subject to the jurisdiction" of the United States, whether the father be at the time in the United States or not. If the father be in the United States he is himself "subject to the jurisdiction thereof." If he is out of the United States he is beyond their jurisdiction, but the child is not.

Certainly the *status* of the child cannot depend upon the fact that his father is or is not in the United States at the time of his birth, when the constitution has prescribed as the only condition that the child shall at the time of his birth be himself "subject to the jurisdiction of the United States."

The conclusions which the plain, certain and positive language of the Fourteenth Amendment renders inevitable, are: 1st. That the children born in the United States of alien parents, unless at the time of their birth they be not in fact "subject to the jurisdiction" of the United States, are citizens of the United States; and 2d. The children born abroad of American parents are not citizens of the United States, even though the residence of the parent or parents in the foreign country be merely temporary, unless the parents be abroad in the service of the United States. The first of these conclusions has received judicial sanction in a recent case (*In re Look Tin Sing*, 4 West Coast Rep. 363; 21 Fed. Rep. 905), in which the Circuit Court of the District of California decided that a child born in San Francisco, of Mongolian parents, who were themselves, not only aliens, but incapable of becoming naturalized was by reason of his birth a citizen of the United States.

The court could have made no other decision under the constitution. The child when born was absolutely and completely subject to the jurisdiction of the United States, and so were his parents, if at the time they were both in this country. The parents being aliens, owed allegiance to their sovereign, the Emperor of China, but being beyond his territory they were not subject to his jurisdiction or laws. A citizen or subject when abroad owes certain duties to his sovereign, but these duties need not be recognised by the citizen and cannot be enforced by the sovereign, so long as the former remains away from home and beyond the jurisdiction of the sovereign.

Speaking of the binding force upon a citizen of the laws of his own country, Justice STORY says: "Whatever may be the intrinsic or obligatory force of such laws upon such persons, if they should return to their native country, *they can have none in other nations wherein they reside*. Such laws may give rise to personal relations between the sovereign and subject, to be enforced in his own domains, but they do not rightfully extend to other nations, '*statuta suo clauduntur territorio nec ultra territorium disponunt*,' nor indeed is there strictly speaking any difference in this respect, whether such laws concern the persons or concern the property of native subjects. * * *

"When, therefore, we speak of the right of a state to bind its own native subjects everywhere, we speak only of its own claim and exercise of sovereignty over them *when they return within its own territorial jurisdiction*, and not of its rights to compel or require obedience to such laws on the part of other nations within their own territorial sovereignty. On the contrary, every nation has an exclusive right to regulate persons and things within its own territory, according to its own sovereign will and public policy." STORY on Conflict of Laws, sect. 20.

It is contended by some that under the Fourteenth Amendment children take their status from their parents, unaffected by the place of their birth, and that the children of aliens, though born in the United States, are not citizens of the United States. The contention is, that the words "subject to the jurisdiction of the United States," do not mean under the actual authority of the United States and subject to their laws, but owing allegiance to the United States. And it is contended that as the alien parent, though within the territory of the United States, still owes allegiance to

his sovereign, he is subject to the jurisdiction of that sovereign, and not to that of the United States, and that the child taking his status from the parent, is in the same manner and to the same extent, subject to the jurisdiction of the same foreign sovereign or nation. It is said that the words "subject to the jurisdiction thereof," do not mean "territorial jurisdiction," but national jurisdiction, that is, the jurisdiction "which a nation possesses over its citizens or subjects as such." There is no such distinction between national and territorial jurisdiction as is here suggested. All jurisdiction is territorial. The jurisdiction of a nation is co-extensive with and confined to its territorial limits. Within its own territory the jurisdiction of a nation is supreme and exclusive. Beyond its own territory, and within the territory of a foreign nation, it has no jurisdiction whatever over persons or property. Jurisdiction is "the power to make, declare and apply the law," or "the power or right of exercising authority." It implies actual and potential power and authority.

Nations have claims upon the allegiance and fidelity of their citizens, wherever they may be, and the citizens of a country everywhere owe duties to it. But these claims cannot be enforced, and these duties need not be recognised, so long as the citizen remains from home; for so long as he is abroad he is beyond the jurisdiction of his country, out of its power and not subject to its law. That which is denominated "national jurisdiction," and defined as "the jurisdiction which a nation possesses over those who are its citizens or subjects as such," when they are beyond its territorial jurisdiction, is no jurisdiction at all. It is not actual or potential, and the citizen is not "subject" to it in any sense of the term.

There is another serious objection to this construction of the constitution. It would render a provision which was intended to clearly and definitely settle the question of citizenship, and to remove the uncertainty which prevailed, as vague and uncertain as the pre-existing law on the subject. If we substitute for the words of the amendment "subject to the jurisdiction thereof," the meaning attributed to them, the constitution would read as follows: "All persons born in the United States, and subject to that jurisdiction which the United States possesses over those who are its citizens or subjects as such, are citizens of the United States, &c." And as citizens of the United States only are subject to such jurisdiction, the amendment could be reduced to the still more simple form:

"All citizens born in the United States, and at the time citizens of the United States, are citizens of the United States."

The argument for this construction, which takes all sense and meaning from the amendment, is based upon the fact that, in the Civil Rights Bill, which was passed by Congress before the adoption of the proposed Fourteenth Amendment, citizenship was defined as follows: "All persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States."

The presumption is reasonable that, in adopting different language in the Fourteenth Amendment from that already in use in the Civil Rights Bill, to define citizenship, the Congress which proposed the amendment were not satisfied with their first definition, and if the Civil Rights Bill was susceptible of the construction we are considering, it is not to be wondered at that they should deem it necessary to revise and reform their definition. For if the words "subject to any foreign power," were, as asserted, equivalent to "subjects of any foreign power," the definition was unmeaning and threw no light whatever upon the question of citizenship. Making the substitution, the Civil Rights Bill would read as follows: "All persons born in the United States, and not subjects of any foreign power, * * * are declared to be citizens of the United States."

The question attempted to be solved being, what persons born in the United States are to be deemed citizens of the United States, how much nearer are we brought to a solution by a declaration that all persons so born are citizens of the United States who are "not subjects of any foreign power?"

But the Congress which passed the Civil Rights Bill cannot be justly charged with such senseless legislation, and that act is not susceptible of any such construction. The words "*subject to any foreign power*," are not the equivalents of "*subjects of any foreign power*." One may be the subject of a nation and not subject to it. An alien, though the subject of another nation, is, nevertheless, subject to the authority and laws of the nation in whose territory he may be, and is not subject to the jurisdiction of his own nation.

II. That the child of American parents born in a foreign country is an alien, is a corollary of the conclusion that the child of alien parents born in this country is an American citizen. In

each case the child is, at the time of its birth, subject to the jurisdiction of the country in which it is born. If, therefore, a child born of Chinese parents in the United States is a citizen, for the same reason a child born of American parents in China is not an American citizen.

This is, however, true only upon the assumption that the Fourteenth Amendment contains, not only an authoritative declaration who are citizens of the United States, but also a comprehensive and exhaustive definition of citizenship, including all who are within its terms, and excluding all who are without them.

The adoption of the Fourteenth Amendment was so recent that the causes which led to it are well known. Its history is given by Justice MILLER, in the *Slaughter-House Cases*, 16 Wall. 36, as follows: "The first section of the Fourteenth article, to which our attention is more especially invited, opens with a definition of citizenship—not only citizenship of the United States, but citizenship of the states. No such definition was previously found in the constitution, nor had any attempt been made to define it by Act of Congress. It had been the occasion of much discussion in the courts by the executive departments and in the public journals. It had been said by eminent judges that no man was a citizen of the United States except as he was a citizen of one of the states composing the Union.

"Those, therefore, who had been born and resided always in the District of Columbia, or in the territories, though within the United States, were not citizens. Whether this proposition was sound or not had never been judicially decided. But it had been held by this court, in the celebrated *Dred Scott Case*, only a few years before the outbreak of the civil war, that a man of African descent, whether a slave or not, was not and could not be a citizen of a state or of the United States. This decision, while it met the condemnation of some of the ablest statesmen and constitutional lawyers of the country, had never been overruled, and if it was to be accepted as a constitutional limitation of the right of citizenship, then all the negro race who had recently been made freemen, were still not only not citizens but were incapable of becoming so by anything short of an amendment to the constitution." 16 Wall. 36.

And having stated thus the uncertainty and doubt which prevailed respecting the whole subject of citizenship, the court says:

"To remove this difficulty primarily and to establish a clear and comprehensive definition of citizenship, which should declare what

should constitute citizenship of the United States and also citizenship of a state, the first clause of the first section was framed."

Justice FIELD, in his dissenting opinion in the same cases, after referring to the same previous uncertainty as to citizenship, says: "The first clause of the Fourteenth Amendment changes this whole subject and removes it from the region of discussion and doubt. It recognises in express terms, if it does not create, citizens of the United States, and it makes their citizenship dependent upon the place of their birth, or the fact of their adoption, and not upon the constitution or laws of any state or the condition of their ancestry."

Immediately following the declaration that "all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside," the Fourteenth Amendment declares that, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." According to the rules of legal construction, the words "citizens of the United States," as used twice in this section, are to be taken as applying to the same persons. It is first declared who are citizens of the United States, and then the states are inhibited to abridge the privileges and immunities of *these* citizens of the United States. If there be any citizens of the United States not included in the declaration, such citizens are not within the protection of the inhibition. Is it reasonable to suppose that in adopting this amendment it was intended that certain citizens of the United States should enjoy privileges and immunities not guaranteed to other citizens of the United States? If the view taken by the Supreme Court be not the correct one, if the Fourteenth Amendment be not comprehensive and exclusive, then we have no authoritative and exhaustive definition of citizenship at all. The previous uncertainty on the subject has not been removed. We cannot have recourse to the established principles of the common law upon which citizenship of the state in which that law prevails may be supported. For the common law never has been adopted as the law of the United States. In all respects, then, except so far as the Fourteenth Amendment has expressly granted or recognised citizenship of the United States, we are left to the undefined and indefinable law of nations to ascertain who are and who are not citizens of the United States.

The occasion of and reasons for the adoption of the Fourteenth Amendment, as well as the unambiguous comprehensive language

of the amendment itself, forbid any such narrow construction of so important a constitutional provision. If the Fourteenth Amendment includes all who are citizens of the United States, then the conclusion is irresistible that the children of American parents born abroad are not citizens of the United States.

But it is claimed that the Supreme Court of the United States has decided to the contrary, in the *Slaughter-house Cases*, in which this language is to be found: "The phrase, 'subject to its jurisdiction,' was intended to exclude from its operation children of ministers, consuls and *citizens or subjects* of foreign states born within the United States:" 16 Wall. 73.

It cannot be denied that this language gives some countenance to the construction of the Fourteenth Amendment contended for. But when it is considered that the question what constituted citizenship of the United States was not involved in the decision, nor even discussed in the *Slaughter-house Cases*, the only issue being how far and as to what "privileges and immunities" citizens of the United States were guaranteed against hostile state legislation, no one can claim that in using the language cited the court has made an authoritative decision on the subject. The opinion expressed by the learned justice who wrote the opinion of the court, was a mere *obiter dictum*, and was, no doubt, the result of inadvertence. If, in the opinion of the court, the children of *all* citizens or subjects of foreign states born in the United States were excluded, why should the children of ministers and consuls be mentioned?"

In the case of *Elk v. Wilkins*, 112 U. S. 102, which was before the Supreme Court in 1884, the construction of the section of the Fourteenth Amendment was necessarily involved, and the court was called upon to decide the meaning of the words, "subject to the jurisdiction thereof," and, in doing so, used the following language: "Indians born within the territorial limits of the United States, members of and owing immediate allegiance to one of the Indian tribes (an alien, though dependent power), although in a geographical sense born in the United States, are no more 'born in the United States and subject to the jurisdiction thereof,' within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign government born *within the domain of that government*, or the children born within the United States, of *ambassadors or other public ministers of foreign nations*."

If, in the opinion of the court, children born of alien parents anywhere become citizens of the country of their parents, would they not have said that these Indians, born members of a recognised tribe, were no more citizens of the United States than the children of subjects of any foreign government born within the domains of this government?

In the case already referred to (4 West Coast Reporter 364), decided in the Circuit Court of the District of California, Justice FIELD says: "They alone are subject to the jurisdiction of the United States who are within their dominions and under the protection of these laws, and with the consequent obligation to obey them when obedience can be rendered; and *only those thus subject* by their birth or naturalization are within the terms of the amendment. The jurisdiction over these latter must, at the time, be both actual and exclusive. The words mentioned except from citizenship children born in the United States of *persons engaged in the diplomatic service of foreign governments, such as ministers and ambassadors*, whose residence, by a fiction of public law is regarded as part of their own country. This extra territoriality of their residence secures to their children born here all the rights and privileges which would enure to them had they been born in the country of their parents."

If the Fourteenth Amendment is susceptible of the construction given it in this article, it includes those who ought not to be citizens and excludes those who should be. It includes the children of persons to whom our laws deny the right of naturalization, and it excludes the children of our own citizens who, at the time of their birth, may be temporarily residing or travelling for pleasure in a foreign land.

There may not be any serious objection to the granting of civil rights to the children of Mongolians, but there is real danger in according political rights to those who have no knowledge of our laws, no appreciation of our principles and no attachment to our government or its institutions.

The Fifteenth Amendment of the constitution supplements the Fourteenth Amendment by prescribing that "the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color or previous condition of servitude."

In view of the danger to be feared from the participation in our

government, at no distant day, by the children of Chinese parents, and in view of the omission to provide for the children of our own people born abroad, our constitution ought to be amended, and that without delay.

THOMAS P. STONEY.

San Francisco, Cal.

RECENT AMERICAN DECISIONS.

Supreme Court of Pennsylvania.

SINGERLY v. THAYER.

T. agreed to put in for S. an elevator "warranted satisfactory in every respect." After trying the elevator, S. refused to accept it.

Held, reversing the court below, that provided he acted in good faith, S. was by the terms of the contract the sole judge whether the elevator was satisfactory.

ERROR to the Common Pleas of Philadelphia County.

This was an action on the case to recover the contract price of an elevator. The facts are sufficiently stated in the opinion which was delivered by

MERCOUR, C. J.—This contention arises on a contract contained in the following written proposal, to wit:

FIFTEENTH AND MARKET,
PHILADELPHIA, PA., 8-10-1881.

WM. M. SINGERLY, Esq.:

I propose to put my Patent Hydraulic Hoist in your new building on Chestnut street (including a duplex pump worth \$800) according to verbal specifications given by your architect, for \$2300, warranted satisfactory in every respect.

Yours,

ELI THAYER.

Plaintiff in error accepted this proposition. The elevator was substantially finished. It proved to be unsatisfactory. He therefore declined to accept it, and gave notice that he desired it to be removed. This Thayer refused to do; thereupon Singerly took it down, and holds it subject to the order of Thayer. The latter brought this suit, claiming the contract price.

The controlling question is, What meaning and effect are to be given to the words "*warranted satisfactory in every respect?*" Satisfactory to whom? Certainly not to the maker only. Was it to be satisfactory to the person for whom it was to be made and

by whom it was to be used? The learned judge thought this was not a necessary requirement, but if it was built in a workmanlike manner and performed its intended purpose in a manner which ought to be satisfactory to the plaintiff in error, that was sufficient. In other words, it may have been wholly unsatisfactory to him, yet if the jury thought he ought to have been satisfied, he was bound to accept it. In effect, that is, it need not have operated to his satisfaction in any respect, but to the satisfaction of the jury which might be called on to pass on the rights of the parties.

The proposition was made to him to purchase a kind of elevator not in general use. The fair inference is that he desired to purchase one that would be satisfactory to himself. The manifest import and meaning of the language used is that it should be satisfactory to him. This, then, was the agreement. To him alone was the proposition made. It would not have been any clearer had it read, "warranted satisfactory to you in every respect." He, therefore, was the person to decide and to declare whether it was satisfactory. This was a fact which the contract gave him a right to decide. He was the person negotiating for its purchase. He was the person who was to test it and to use it. No other persons could intelligently determine whether in every respect he was satisfied therewith.

McCarren v. McNulty et al., 7 Gray 139, was on an agreement to make a book-case "in a good, strong and workmanlike manner, to the satisfaction of the president of the society," for which it was to be made. It was held not to be sufficient to prove that it was constructed according to the terms of the agreement, without also proving that it was satisfactory to or accepted by the defendant.

When the agreement is to make and furnish an article to the satisfaction of the person for whom it is to be made, numerous authorities declare it is not a compliance with the contract to prove he ought to have been satisfied. It was so held in *Gray v. Rd.*, 11 Hun 70, where the contract was for the purchase of a steamboat; in *Brown v. Foster*, 113 Mass. 136, where the agreement was to make a suit of clothes; in *Zaleski v. Clark*, 44 Conn. 218, on a contract for a plaster bust of a deceased husband of the defendant; in *Gibson v. Cranage*, 39 Mich. 49, where a portrait was to be satisfactory to the defendant, and in *Hoffman v. Gallagher*, 6 Daly 42, where a portrait of defendant was to be satisfactory to his friends. So where a person got a set of teeth from a dentist

under an agreement that they were to be satisfactory, it was held, in *Hartman v. Blackburn*, 7 Pittsburgh Legal Journal 140, that he was made the exclusive judge of their value.

To justify a refusal to accept the elevator on the ground that it was not satisfactory, the objection should be made in good faith. It must not be merely capricious. It is declared in 1 Parsons on Contracts 542, if A. agrees to make something for B., to meet the approval of B., or with any similar language, B. may reject it for any objection which is made in good faith, and is not merely capricious. *Andrew v. Belfield*, 2 C. B. (N. S.) 779, is cited to support this view. That case arose on a written agreement to build a carriage, in a manner which should meet the approval of the person for whom it was to be made, not only on the score of workmanship, but also that of convenience and taste. It was held that his rejection, made in good faith, was conclusive.

This "hoist" is unlike those in most general use. They are usually suspended from a wire or rope cable, which may be operated either by water or by steam; this is supported by a single upright iron column made in sections, which run into each other, like the sections of a telescope; it stands under the centre of the car; when the sections are folded closely together the car is at its lowest position; on the water being poured into the sections by a steam pump, the pressure of the water within the column causes the sections to draw out, thereby forcing the car upward, and so sustaining it. When a valve is opened, the water escapes, then the weight of the car and the weight of the upper sections of the column cause the sections to run into each other, and the car descends.

While the evidence is conflicting as to the efficient working of the elevator, and the weight thereof induced the jury to find the elevator ought to have been satisfactory, yet we think there is evidence to show the plaintiff in error acted in good faith and not in mere caprice, in refusing to accept it. We will refer to some. John Doris testifies that he ran this elevator about a month; that he would take it from the first to the sixth floor; it would almost drop from the sixth to the third floor, and then it would almost stop, and then go slowly down; it acted the same whether the steam pressure was great or small, it would start and jump in getting up to where we wanted to go; almost every trip it would drop suddenly from the sixth to the third floor; if we put on a load it would jump all the way up. John Norris, who rode on it four or five times,

says, "it was jerky, and every little period it gave a little jerk, causing your stomach to rise." Albert Merritt testified he had ridden on them, but they were so unsatisfactory and uncertain that he preferred to walk upstairs; they would stick both going up and coming down. He had one of the same kind, which he says was not entirely completed, although two or three months were occupied in trying to put it in order; he "considers them the biggest frauds he ever saw in the elevator line." S. Lloyd Wiegand, a mechanical engineer of twenty-eight years experience, testifies that a building of moderate height can use them very well; it don't work well in a tall building." Hale, the architect of the building, rode on it and saw it often. He says, it did not run smoothly; at the end of every section it would give a jerk and a click. He examined this and others of the same kind to report to the plaintiff in error, and "came to the conclusion that it would never do as a passenger elevator on which ladies were to ride." He informed the agent of the contractor that the elevator was a failure. Plaintiff in error also testifies to its jerking and irregular motion, being such as to scare him, and his fear of an accident; of notice to the agent that it was unsatisfactory; and of his offer to give \$500 if he would take it out.

It may have been very unwise in the maker of this elevator to agree to expend labor and furnish materials and rely for payment on the uncertain approval of one so largely interested in determining whether it was satisfactory to himself. Having, however, entered into a contract whereby he did run this risk, his legal rights are to be determined thereby; *McCarren v. McNulty et al.*, *supra*. In *Nelson v. Von Bonnhorst*, 5 Casey 352, one gave a written instrument under seal admitting an indebtedness to another in a specific sum, which he agreed "to pay whenever, in my opinion, my circumstances will enable me to do so." It was held that the instrument imposed no legal obligation which could be enforced by action, as the maker was the sole judge of his ability. In that case there was an unquestioned indebtedness to be discharged by the payment of money. Every other person might swear the circumstances of the debtor made him abundantly able to pay, yet that did not determine his legal liability.

It is claimed that the elevator was rejected before it was finished, and, if time had been given, it would have been made satisfactory. If, in fact, it was rejected before it was substantially completed, so

that the plaintiff in error could not reasonably determine whether it was or would be satisfactory to him in all respects, then his rejection was prematurely made, and, under the pleadings, would not constitute a bar to the action. If, however, it was sufficiently completed so he could understand how it would operate, he was not bound to wait an unreasonable time for the entire completion of some minor things.

In so far as the specifications of error are in conflict with this opinion, they are not sustained.

Judgment reversed and a *venire facias de novo* awarded.

A high authority, Dr. Wharton, (Contracts sect. 289, note) criticises the book-case case, cited in the foregoing opinion, and the case of *Atkins v. Barnstable*, to be noticed further on, as going "too far in leaving the matter to the purchaser's caprice." Still we believe that the opinion of MERCUR, C. J., lays down the reasonable, as well as the actual rule. For it must be borne in mind that the law assumes not to make contracts, but to enforce them according to what the parties intended, according to the ordinary meaning of words. If the parties choose to make a hard contract, that is their own lookout.

A word or two more may be said as to some of the authorities cited in the principal case.

In *Gray v. Railroad* the steamboat was to be taken, "provided upon trial, they (the purchasers) are satisfied with the soundness of her machinery."

The plaster-bust case is a very strong one. The order was taken by the sculptor's agent, who assured Mrs. Clark that she need not take the bust unless satisfied with it. Mrs. Clark visited the studio more than once while the work was in progress, and made some suggestions which the artist carried out. The lack of proper life-like expression, which was the objection to the bust, appeared to be not the artist's fault, but owing to the nature of the bust as a dead-white model. Here was a case of capricious

dissatisfaction if ever one there was; but as the court pithily said, the contract was not to make a bust that she ought to, but one that she would, be satisfied with.

In *Brown v. Foster* evidence was given of the custom among tailors, that clothes should be sent back for alteration if they did not fit. The defendant was called upon to try on the clothes in court, and several tailors testified that a few alterations would make them right; but the contract was for a suit to be ready at a certain day, and the court refused to interfere. Leaving now the cases adduced by MERCUR, C. J., in *Atkins v. Barnstable*, 97 Mass. 428, one of the cases which Dr. Wharton objects to, the contract was for work to be done "to the acceptance of the county commissioners." In *Barlow v. Thompson*, 46 Ind. 384, water-wheels were to work to the "entire satisfaction" of the purchaser.

In *Harris v. Miller*, 6 Saw. 319, under an agreement that they should have a bond "to their satisfaction," defendants were held to be justified in refusing plaintiff's own bond, and demanding a bond with sureties; but this case is not as strong as are the others, other circumstances beside the tenor of the contract rendering a bond with sureties proper.

In an English case, *Roberts v. Smith*, 4 H. & N. 315, the plaintiff was to be engaged at a certain salary, as secretary of a company about to be formed; in case the company was not formed he was

to receive for his time and labor expended, such remuneration as the defendant might deem right. The company was not formed, and the plaintiff brought suit for his compensation. The court decided that there was no contract such that he could recover upon, and MARTIN, B., said: "The argument that, as a matter of law, the plaintiff is entitled to be paid, is incorrect; it is by no means a matter of law that a person shall be paid for his services—it is a matter of contract." Other members of the court alluded to the probability that the plaintiff was willing to take the chance of losing all compensation, to ensure his position in case the company should be organized. And on this subject a recent English author (Pollock on Contracts, p. 44) remarks: "A promise of this kind, though it creates no enforceable contract, is so far effectual as to prevent the promisee from falling back on any inferred contract to pay a reasonable remuneration."

In *Hartford Co. v. Brush*, 43 Vt. 528), the sale was of a patent sugar evaporator, which the defendant was to take if he liked it. It was in evidence that the defendant was sick during most of the time the apparatus was being tested, and his objections were derived from the reports of the workmen under him. The jury found for defendant, and their judgment was sustained on appeal, the court saying that "honesty of purpose," absence of "wilful caprice," or "dishonorable design" were all that could be required. In almost all the cases this element of *good faith* is spoken of as necessary on the part of the party refusing the article. At this point the inquiry suggests itself: How is this question of good faith to be determined? Is not good faith, like everything else in the contract, at the option of one party? There is some difficulty here. The best answer is to be found in the language of a case which well illustrates the whole subject: *Daggett v. Johnson*, 49 Vt. 345. "He (the buyer) must act honestly

and in accordance with the reasonable expectations of the seller *as implied from the contract.*" (The italics are ours.)

The sale in this case was of a set of patent milk-pans, for which the buyer was to pay "if satisfied with the pans." The peculiarity of the pans was that they were to be used in a certain manner, with running water about them to graduate the temperature of the milk. The buyer used them like ordinary pans, which was of course no test, and then declared himself dissatisfied with them. It was adjudged that he must pay for them. "His dissatisfaction," it was said, "must be actual, not feigned." But it must be presumed from the analogy of the decisions reviewed in this note, that if the buyer had used the pans in the manner the contract contemplated, the court would not have made inquiry into the degree or the reality of his objections.

One case only has been found opposing this line of decision (*Folliard v. Wallace*, 2 Johns. 395), a contract for the purchase of real estate, for which the buyer was to pay after he was well satisfied the title was undisputed and good against all other claims. Payment was refused on the ground of an outstanding claim of title, but it was shown that this claim was unsound and the title really good. Chancellor, then Ch. Justice KENT, after showing the clearness of the title, said: "Nor will it do for the defendant to say he was not satisfied with his title without showing some lawful incumbrance or claim existing against it. A simple allegation of dissatisfaction, without some good reason assigned for it, might be a mere pretext, and cannot be regarded. If the defendant were left at liberty to judge for himself when he was satisfied, it would totally destroy the obligation, and the agreement would be absolutely void. * * * This law in this case will determine for the defendant when he ought to be satisfied."

This authority is certainly opposed to the principal case, although its force may

be lessened by the fact that the question in the case, the title to land, is one which is peculiarly within the power and duty of a court to determine.

Singerly v. Thayer, and the cases in accord with it, become clearer when they are put in contrast with others where the right of decision is not vested absolutely and even arbitrarily in a party to the contract.

The agreement in *Cummer v. Butts*, 40 Mich. 322, was for selling lumber on commission, and might be cancelled by either party "for good cause." One party became dissatisfied and ended the contract. The court below allowed the question of good cause to go to the jury. The Appeal Court reversed the judgment because it was impossible to reduce the phrase "good cause," to any legal certainty.

In *Mueller v. U. S.*, 19 Court of Claims 581, the agreement was to furnish building stone "at such times and in such quantities as may be required by the government." The government, contemplating a change of plan, broke off the work, causing heavy loss to the contractor. The court said that the word *required*, referred not to the unsettled purposes of the government, but to the needs of the work contemplated by the contract. In other words the working of the contract conferred no arbitrary power of refusing the stone.

In *McClamrock v. Flint*, 101 Ind. 278, a mill was sold on condition of return if it did not "work well." It was held necessary to state wherein the machine did not work well, because, as the court observed, "a defendant who alleges that a mill or machine does not work well simply states his own judgment." See also *Clark v. Rice*, 46 Mich. 308.

Between a case like this and the principal case, the distinction is plain. In the former case the sufficiency of the article, the subject-matter of the contract is a matter of fact, to be settled as questions of fact are settled—the case is one of war-

ranty; in the latter case the sufficiency of the article is left to the judgment, call it the caprice if you will, of one party to the contract. It is a question of what the ordinary meaning of words is. The word *satisfactory*, for instance, which has been found to occur so often, has in common acceptation a subjective meaning, a reference to the attitude of the mind towards a thing, and not to the intrinsic merit of a thing.

The losing sight of the distinction between a contract, the decision of which rests with the parties, and one the decision of which devolves upon the court and jury, is at the bottom of all the trouble in the class of cases before us.

The rule laid down in the text covers the numerous instances of contracts where the judgment of a supervising architect or other expert is final as to work done, as in *Dingley v. Greene*, 54 Cal. 333; *Schenke v. Rowell*, 7 Daly (N. Y.) 286; *Kane v. Stone Co.*, 39 Ohio St. 1; *Hartupsee v. Pittsburgh*, 97 Penn. St. 107; *Kihlberg v. United States*, 97 U. S. 398; *Sweeney v. United States*, 109 Id. 618; *Cass v. Railroad*, 80 Penn. St. 31. At least one decision, however, denies the finality of the architect's decision: *Hurst v. Litchfield*, 39 N. Y. 377.

A somewhat curious point is decided in *Tetz v. Butterfield*, 54 Wis. 242. The work was to conform to the specifications, etc., "according to the full satisfaction of W. D., architect, and to the satisfaction of the owner." It was considered that the last clause was meant only to prevent any change of plan without sanction of the owner; as to the quality of the work the architect alone was to judge.

Another class of cases arises on contracts to build railroads where the amount of grading, etc., done is to be estimated finally by the company's engineer. In England, no agreement can shut out the jurisdiction of equity to correct erroneous statements, while here it is usually

held that an estimate in good faith is final. *Scott v. Avery*, 5 House of Lords 811; *Herrick v. Railroad*, 27 Vt. 673; *Hennessey v. Farrell*, 4 Cush. 267; *Condon v. Railroad*, 14 Gratt. 302; *Alton Rd. v. Northcott*, 15 Ill. 49. One case at least, however (*Kistler v. Railroad*,

88 Ind. 460), rules that any agreement not to resort to legal proceedings is against the policy of the law. But the case arose on an under-estimate of work done—a simple question of fact.

CHARLES CHAUNCEY SAVAGE.

Philadelphia.

Supreme Court of Indiana.

HEDDERICK v. SMITH.

A tenant who, for the better enjoyment of the leasehold, erects thereon buildings, may, at any time before his right of enjoyment ceases, remove such buildings, if the removal can be accomplished without permanent injury to the freehold.

If he neglects to remove them during his rightful continuance in possession, unless his right to do so afterwards is reserved by agreement with the landlord, he is presumed to have abandoned them, and his right ceases.

If the tenant take a new lease from the landlord without reserving the right to remove the buildings placed by him on the demised premises for his own enjoyment, he cannot at the expiration of such new term remove such buildings.

A mere extension, however, of the old lease upon the same terms will not conclude his right to remove such buildings; and the respective rights of the parties will remain the same.

APPEAL from the Marion Superior Court.

P. Rappaport, for the appellant.

F. S. Rollins, for the appellee.

The opinion of the court was delivered by

MITCHELL, C. J.—Elizabeth D. Smith, as owner of certain premises in the city of Indianapolis, brought this suit against Hedderick who was in possession, to restrain him from removing therefrom a "club house," which had been erected thereon, and other alleged fixtures, which, it was claimed, were a part of the freehold. The case was put at issue and tried by the court, the result being a finding and judgment for the plaintiff below. On appeal to the general term, the only error assigned was that the court, at special term, erred in overruling the appellant's motion for a new trial. Under the settled practice no alleged errors will be considered here, except such as were assigned at the general term: *Miller v. State*, 61 Ind. 502.

It is a question whether the bill of exceptions containing the evidence is certified by the judge in such manner as to entitle it to consideration here. But waiving the alleged irregularities in that regard, we find the following undisputed facts exhibited in the evidence. The plaintiff took title to the premises from her deceased husband, Ebenezer Smith. The place was known as "Volks Garden," and had upon it one building which was used as a saloon, and another called the "Club-house." The club-house was built by one Baldes while occupying as tenant of Smith. In April 1879, Hedderick, with the knowledge and consent of Smith, purchased the club-house and fixtures of Baldes, paying therefor \$700 in cash.

Contemporaneously with the purchase from Baldes, he took a lease of the premises from Smith for a term of three years. Whether by the terms of this lease the right to remove the property in dispute was reserved does not appear. During the continuance of this lease Smith died, and his widow succeeded to his title. At the expiration of the term Hedderick leased the premises from Mrs. Smith, for the term of one year at a stipulated rent, payable monthly. The rent reserved for the new term was different from the old. The lease contained the usual covenants for repair by the tenant, and for the surrender of the premises at the expiration of the term, without waste. There is in it no reservation of a right to remove any building or fixtures annexed to or situate upon the land. Some repairs and alterations were made to the club-room by the tenant during his term, and he asserted the right to remove it and the fixtures which he had purchased from Baldes. Whether the building was so annexed to the freehold as to become part of it, or whether it could be removed without injury to the reversion, were propositions asserted on one hand and denied on the other. But as the finding of the court was for the plaintiff, it must be assumed here that it was. That a tenant who, for the better enjoyment of the leasehold, erects thereon buildings, may, at any time before his right of enjoyment ceases, remove such buildings, if the removal can be accomplished without permanent injury to the freehold, is well settled. It is equally well settled that if he neglects to remove them during his rightful continuance in possession, unless his right to do so afterwards is reserved by agreement with the landlord, he is presumed to have abandoned them, and his right ceases. *Cromie v. Hoover*, 40 Ind. 49; *Allen v. Kennedy*, Id. 142; *Hamilton v. Huntley*, 78 Id. 521; *Griffin v. Ransdell*, 71 Id. 440.

Assuming that the tenant had the right to remove the building and fixtures during the continuance of his first term, the question still remains, what was the effect of his taking a new lease upon different terms from Mrs. Smith, without reserving any right of removal? Without question, if there had been nothing more than an extension of the old lease upon the same terms, the respective rights of the parties would have remained the same. The acceptance of a new lease upon different terms was, however, the creation of a new tenancy. It would seem that when the new lease was made, it was a lease of the whole estate as it then existed, including the club-house now in dispute, with whatever else was a part of the freehold. This estate the lessee covenanted to maintain in repair, and at the expiration of his term surrender up. It results from the terms of the lease, that whatever constituted a part of the freehold at the time the lease was accepted must be surrendered at its termination, and the lessee will not be permitted to say that part of the premises leased was in fact a trade fixture, erected by him under a previous lease, and that he has the right, against the face of his contract, to sever and remove it. To permit the tenant to do this, would, in effect, be to permit him to deny the title of his landlord to part of the demised premises. And if he may deny his title to a part, why not to the whole? The acceptance of the new lease was an effectual surrender of the old, together with the estate, and all other rights which the old lease secured to him. Thenceforth he was in as of a new estate, which is to be measured by the condition of things existing when it commenced, and by the covenants, conditions and reservations contained in the new lease, from which the rights of the parties must be determined and regulated. Upon this subject the elementary writers are agreed. Accordingly, the rule is stated by an approved author, thus: "But while a tenant may remove trade fixtures at any time during his original term, or any renewal thereof, yet, although he continues in possession after the expiration of his original term, if he holds under a new lease, in which no provision for the removal of the fixtures is made, he is treated as having abandoned his right thereto:" Wood. Landl. and Ten., § 532. So, also, in Tayl. Landl. and Ten., § 552, the author says: "If a tenant, at the close of his term, renews his lease, or surrenders it for the purpose of acquiring a fresh interest in the premises, he should take care to reserve his right to sever under the old tenancy; for when his continuance in possession is under a

new lease or agreement, his right to remove fixtures is determined, and he is in the same situation as if the landlord, being seised with the land, together with the fixtures, had demised both to him."

The principles above stated are sustained by the adjudications of the courts in the following, among other well-considered cases: *Loughran v. Ross*, 45 N. Y. 792; *Watriss v. First Nat. Bank*, 124 Mass. 571; *Jungerman v. Bovee*, 19 Cal. 355.

Judgment affirmed, with costs.

This note will be confined to those cases touching the time when a tenant must exercise his right to remove fixtures placed by him on the freehold. If the tenant has the right to remove the fixtures, when must he exercise it?

The reasons for the rule allowing the tenant to remove the fixtures has been well stated by Judge COOLEY: "The right of a tenant to remove the erections made by him in furtherance of the purpose for which the premises were leased is conceded. The principle which permits it is one of public policy, and has its foundation in the interest which society has that every person shall be encouraged to make the most beneficial use of his property the circumstances will admit of. On the other hand, the requirement that the tenant shall remove during his term whatever he proposes to claim a right to remove at all, is based upon a corresponding rule of public policy, for the protection of the landlord, and which is—that the tenant shall not be suffered, after he has surrendered the premises, to enter upon the possession of the landlord or of a succeeding tenant, to remove fixtures which he might and ought to have taken away before. A regard for the succeeding interests is the only substantial reason for the rule which requires the tenant to remove his fixtures during the term; indeed, the law does not in strictness require of him that he shall remove them during the term, but only before he surrenders possession, and during the time that he has a right to regard himself as occupying in the character of

tenant:" *Kerr v. Kingsbury*, 39 Mich. 150; s. c. 33 Amer. Rep. 362; 17 Amer. L. Reg. 638.

The expression "during the term" is frequently used in the cases, and has its origin in an early case. Thus in 1804, in the Year Book, Henry VII. 136, pl. 24, the rule is stated, "And if the lessee for years makes such a furnace for his advantage, or a dyer makes his vats and vessels to carry on his occupation during his term, he may remove them; but if he suffers them to remain fixed to the earth after the end of his term, then they belong to the lessor." So in *Prole's Case*, 1 Salk. 368, it was said by Lord HOLT that "during the term the soap-boiler might well remove the vats; but after the term they become a gift in law to him in reversion, and are not removable.

In *Lyde v. Russell*, 1 B. & Ad. 394, Lord TENTERDEN said: "In a very excellent treatise on the law of fixtures by Mr. Amos and Ferrard (p. 87), it is laid down that a tenant must use his privilege in removing fixtures during the continuance of his term; for, if he forbear to do so within this period, the law presumes that he voluntarily relinquishes his claim in favor of the landlord." After citing the two cases last cited above, he proceeded: "According to these authorities then, the property in fixtures, which would be in the tenant if he removed them during the term, vests in the landlord on the determination of the term." See also *Hallen v. Runder*, 1 C., M. & R. 266; *Lee v. Risdon*, 7

Taunt. 188; *Mackintosh v. Trotter*, 3 M. & W. 184.

In *Weeton v. Woodcock*, 7 M. & W. 14, 19, ALDERSON, B., said: "The rule to be collected from the several cases decided on this subject seems to be this—that the tenant's right to remove fixtures continues during his original term, and during such further period of possession by him as he holds the premises under a right to consider himself a tenant. That was the rule on which this court acted in *Minshall v. Lloyd*, 2 M. & W. 460, in which PARKE, B., in giving his judgment, puts it on the ground that there was 'no doubt that in that case the steam-engines were left affixed to the freehold after the expiration of the term, and after the plaintiffs had any right to consider themselves tenants. In the present case, also, this boiler was removed after the entry for a forfeiture, and at a time after the assignees had ceased to have any right to consider themselves as tenants.'"

In *Merritt v. Judd*, 14 Cal. 59, the rule is stated in the following language: "The tenant's right to remove fixtures continues during his original term, and during such further period of possession by him, as he holds the premises under a right still to consider himself a tenant; and, we have seen, beyond this the great weight of authority does not go:" Citing *Welton v. Woodcock*, 7 M. & W. 14.

In *Leader v. Homewood*, 5 C. B. (N. S.) 546, Mr. Justice WILLES, commenting on *Weston v. Woodcock*, and *Penton v. Robart*, 2 East 88, said: "It is perhaps not easy to understand fully what is the exact meaning of this rule, and whether or not it justifies a tenant who has remained in possession after the end of his term, and so become a tenant at sufferance, in severing the fixtures during the time he continues in possession as such tenant. But the rule, whatever its exact meaning may be, is plainly inconsistent with the argument relied on by the counsel for the plaintiff in the

present case, viz.: that the right of the tenant continues till he has evinced an intention to abandon his right to the fixtures." So in *Mackintosh v. Trotter*, 3 M. & W. 184, Baron PARKE, after stating whatever is planted in the soil belongs to the soil, remarked "that the tenant has the right to remove fixtures of this nature during his term, or during what may, for this purpose, be considered as an excrescence on the term." And in the Massachusetts case, referring to these English cases, it was said: "It is clear from these cases that the right of a tenant, in possession after the end of his term, to remove fixtures within a reasonable time, does not rest merely on the fact that he is in occupation, or has not evinced an intention to abandon, but because he is still in contemplation of law, in occupation as tenant under the original lease, and, as Baron PARKE says, under what may be considered an excrescence on the term, that is, as tenant at sufferance: *Watriss v. First Nat. Bank of Cambridge*, 124 Mass. 571; s. c. 26 Amer. Rep. 694.

From these cases, and others to be cited, it may be laid down as a general rule, that so long as the tenant occupies the premises previously leased under or by virtue of the lease, during the continuance of which he placed the fixtures on the demised premises, he may remove the fixtures; but the instant he ceases to hold the premises under or by virtue of the lease, his right is at an end.

To this there is an exception. Thus, "where the term is uncertain, or depends upon a contingency, as where a party is in as tenant for life, or at will, fixtures may be removed within a reasonable time after the tenancy is determined:" *Watriss v. First Nat. Bank of Cambridge*, *supra*; *Ellis v. Paige*, 1 Pick. 43, 49; *Doty v. Gorham*, 5 Id. 487, 490; *Martin v. Roe*, 7 E. & B. 237; *Reynolds v. Shuler*, 5 Cow. 323; *Loughran v. Ross*, 45 N. Y. 792; s. c.

6 Amer. Rep. 173; *Elwes v. Mawe*, 3 East 38; s. c. 2 Smith's L. C. 228; *Whiting v. Brastow*, 4 Pick. 310; see *Penton v. Robart*, 2 East 88.

The taking of a new lease while in possession under a previous lease has been regarded such a surrender of the possession that it was a release by the tenant of his right to remove the fixtures placed there during such previous lease. It is construed as a lease of the freehold with the fixtures, especially if the new lease contains any terms different from the first lease. In *Watriss v. First Nat. Bank of Cambridge*, *supra*, it was said: "But a very different question is presented when the same tenant continues in possession under a new lease containing different terms and conditions, making no reference to the old lease, reserving no rights to the lessee in fixtures annexed during the previous term and not removed before its expiration, and containing the covenant to deliver up the premises at the end of the term in the same condition. This is not the extension of or holding over under an existing lease; it is creation of a new tenancy. And it follows that whatever was a part of the freehold when the lessee accepted and began his occupation under the new lease must be delivered up at the end of the term, and cannot be severed on the ground that it was put in as a trade fixture under a previous lease which has expired. The failure of the lessee to exercise his right to remove during the former term, or to reserve it in his new contract, precludes him from denying the title of his landlord to the estate, and the fixtures annexed which have become part of it. The occupation under the new lease is in effect a surrender of the premises to the landlord under the old."

In *Loughran v. Ross*, *supra*, it was said: "The surrender of the premises, after the expiration of the lease, is such an abandonment as vests the title in the landlord. In reason and principle the acceptance of a lease of the premises, in-

cluding the buildings, without any reservation of right, or mention of any claim to the building and fixtures, and occupation under the new letting, are equivalent to a surrender of the possession to the landlord at the expiration of the first term. The tenant is under a new tenancy, and not under the old; and the rights which existed under the former tenancy, and which were not claimed or exercised, are abandoned as effectually as if the tenant had actually removed from the premises, and after an interval of time, shorter or longer, had taken another lease and returned to the premises. A lease of lands and premises carries with it the buildings and fixtures on the premises, and the tenant, accepting a lease of the premises without excepting the buildings, takes a lease of the lands with the buildings and fixtures, and acknowledges the title of the landlord to both, and is estopped from controverting it." See *Eten v. Luyster*, 60 N. Y. 252, 261.

In *Watriss v. First Nat. Bank of Cambridge*, the plaintiff leased the premises to the Harvard Bank on January 1st, 1861, for five years at a fixed rent, with the privilege of an additional term of five years on the same conditions. The lessee constructed a fire-proof safe or vault and placed other fixtures on the premises. The lessee (the bank) was afterwards changed into a national bank under the name above given. The new bank elected to extend the lease as above stated, and continued in occupation until October 7th, 1870, when a new lease was entered into by the parties for five years from January 1st, 1871, at an increased rent, and the new lease contained the same provisions as the old one, with an additional covenant in case of fire, that the rent was to cease until the repairs were completed. About November 8th, 1875, the defendant (the bank) removed the safe and fixtures. Under these facts it was held that such removal was unlawful.

Other cases on a similar state of facts are decided in the same way: *Marks v. Ryan*, 63 Cal. 107; *Jungerman v. Boece*, 19 Id. 345; *Abell v. Williams*, 3 Daly 17; *Deeble v. McMullen*, 8 Ir. Com. L. 355; *Shepard v. Spaulding*, 4 Met. 416; *Darrah v. Baird*, 40 Leg. Int. 121; s. c. 22 Amer. L. Reg. 533. See generally, *Thomas v. Crout*, 5 Bush 37; *Dingley v. Buffum*, 57 Me. 381; *Youngblood v. Hurris*, 68 Ga. 630.

A lessee, who had erected fixtures for the purposes of trade upon the demised premises, and afterwards took a new lease to commence at the expiration of his former one, which new lease contained a covenant to repair, it was said, was bound to repair those fixtures unless strong circumstances existed to show that they were not intended to pass under the general words of the second demise. *Thresher v. East London Water-Works*, 2 B. & C. 608.

A suit in ejectment was commenced February 8th; on the 19th the defendant allowed judgment to go by default upon the lessor of the plaintiff entering into the following agreement: "In consideration of Messrs. J. & G. B. [the tenants], not appearing in this action, I hereby undertake not to issue a writ of possession until after the 25th day of March next." It was held that the defendants were, by the agreement, precluded from removing fixtures put up by them on the premises, in the interval between February 19th and March 25th, the fair construction of the agreement being that the premises should be given up in the same state that they were in on the day the judgment was signed. *Heap v. Barton*, 12 C. B. 274; s. c. 16 Jur. 891.

Fitzherbert v. Shaw, 1 H. Bl. 258, is considered one of the leading cases on this subject. There the purchaser of land brought an ejectment suit against the tenant from year to year, and the parties entered into an agreement that judgment should be signed for the plaintiff with a stay of execution until a given period.

It was held that the tenant could not in the interval remove fixtures from the premises, which he had himself erected during his term, and before the action was brought.

A tenant at will of a lessee of land erected a small building on the land resting on stone posts sunk in the ground. The building was erected with the knowledge and consent of the lessor of the ground, and with the understanding on his part, and on that of the tenant at will, that it would be removed as a trade fixture. Both tenancies expired at the same time, and neither tenant removed the buildings; the lessor resumed possession of the premises, and soon after the former tenant at will hired it with other land at an increased rent. It was held that the tenant at will could not, after this, remove the building. *McIver v. Estabrook*, 134 Mass. 550.

The doctrine of the principal case has not always been followed: *Kerr v. Kingsbury*, 39 Mich. 150; s. c. 33 Am. Rep. 362, is a notable instance of this dissent. In that case the following reasoning was used, after referring to the general rule that the fixture must be removed before the term expires or possession is given: "But why the right should be lost when the tenant, instead of surrendering possession, takes a renewal of his lease is not very apparent. There is certainly no reason of public policy to sustain such a doctrine; on the contrary, the reasons which saved to the tenant his right to the fixtures in the first place are equally influential to save him on a renewal what was unquestionably his before. What could possibly be more absurd than a rule of law which should in effect say to the tenant who is about to obtain a renewal: 'If you will be at the expense and trouble, and incur the loss, of removing your erections during the term, and of afterwards bringing them back again, they shall be yours; otherwise you will be deemed to abandon them to your landlord.'"

This was a case where the new lease was accepted from a new landlord, and it was held that the tenant was not prohibited from removing trade fixtures placed on the premises during the continuance in force of the first lease; and the court cites the language used in *Davis v. Moss*, 38 Penn. St. 346, 353, where it is said, "if a tenant remains in possession after the expiration of his term, and performs all the conditions of the lease, it amounts to a renewal of the lease from year to year, and I take it he would be entitled to remove fixtures during the year." To the same effect is *Devin v. Dougherty*, 27 How. Pr. 458.

If the first lease is a written one, and the second only in parol, the effect upon the right to remove the fixtures is the same: *Loughran v. Ross*, *supra*.

An exception to the general rule, that the tenant must remove the fixtures *during the term*, has already been noted. In one case it was said of this rule, "to apply it to a party in possession under a lease revocable at pleasure, would be manifestly unjust and without reason. It would be allowing a party, without any fault of his own, or any opportunity of removal, to be deprived of his property at the mere will and caprice of another." *Northern Cent. Ry. Co. v. Canton Co.*, 30 Md. 347; s. c. 8 Am. L. Reg. 540. So that where a landlord agreed to sell a trade fixture for the tenant's benefit, and the tenant left it after the expiration of his time, and the landlord failed to sell it, it was held that the tenant had a reasonable time, after the term, to remove it, and that his creditors had the same right of attachment: *Torrey v. Burnett*, 9 Vroom 457; s. c. 20 Am. Rep. 421.

So, where a lease was given by an agent without sufficient authority during the absence of the owner, and was terminated by the owner on his return from abroad, it was decided that the tenant became a tenant at sufferance, and could remove his fixtures within a reasonable time after such termination: *Antoni v. Belknap*, 102 Mass. 193.

So the same is true in case of a forfeiture of a lease: *Weeton v. Woodcock*, 6 M. & W. 14.

Likewise if the landlord, before the expiration of the term, enjoins the tenant from removing his fixtures, the tenant will be allowed a reasonable time after the dissolution of the injunction within which to demand and remove them: *Goodman v. Hannibal & St. Joseph Rd. Co.*, 45 Mo. 33.

Certain premises were let for no certain time, for a nursery, for raising trees and plants until ready to be transplanted. It was ruled that the trees must be removed within a reasonable time after the lease was terminated: *King v. Wilcombs*, 7 Barb. 263; and if the term is certain, then before possession is yielded: *Brooks v. Galster*, 51 Barb. 196.

But where the lease is thus unexpectedly terminated, it would seem that the fixtures must be removed *before possession is yielded*, else the effect will be an abandonment: *Leruder v. Homewood*, 5 C. B. (N. S.) 546; *Gibson v. The Hammersmith Rd. Co.*, 32 L. J. Ch. 337, 342; *Heap v. Barton*, *supra*; *Martin v. Roe*, *supra*; *Weeton v. Woodcock*, *supra*. See *Sumner v. Bromilou*, 34 L. J., Q. B. 130; *Minshall v. Lloyd*, 2 M. & W. 450.

W. W. THORNTON.

Crawfordsville, Ind.

Circuit Court, E. D. Louisiana.

SEIGNOURET v. HOME INS. CO. ET AL.

The capital stock of a corporation cannot be reduced except by express legislative authority.

A statute giving authority to stockholders to make modifications, additions or changes in their act of incorporation, or to dissolve it, with the assent of three-fourths of the stock, does not confer upon them power to reduce the capital stock.

IN CHANCERY.

E. H. Farrar and *E. B. Kruttschnitt*, for complainants.

Chas. B. Singleton, *Richard H. Browne*, and *B. F. Choate*, for defendants.

The opinion of the court was delivered by

PARDEE, J.—The suit is brought to restrain the Home Insurance Company from reducing its capital stock. The question is one of the power of the company, and not of the propriety of its proposed action. It is well-settled corporation law, "that a corporation has no implied authority to alter the amount of its capital stock where the charter has definitely fixed the capital at a certain sum. The shares of a corporation can neither be increased nor diminished in number, or in their nominal value, unless this be expressly authorized by the company's charter." *Morawetz Priv. Corp.*, § 230. See *Tayl. Priv. Corp.*, § 133; *Green's Brice's Ultra Vires* 158; *Granger's Life Ins. Co. v. Kamper*, 73 Ala. 325. And it is understood that the same law prevails in Louisiana. See *Percy v. Millaudon*, 3 La. 569. Article 239 of the constitution of Louisiana prohibits increase of stock of corporations, except in pursuance of general laws. See, also, act 26th of 1882, of the Laws of Louisiana, specifically providing the mode and manner by which the stock of corporations may be increased. See, also, section 693, Rev. St. La. From these Louisiana authorities it seems clear that the authority to increase the capital stock of a corporation must be express. It would also seem that, as the constitution and the law thereunder provide for the increase of the stock, but are silent as to a decrease, the power to decrease the stock of a corporation was intentionally denied.

All the authorities examined, and the nature of things, are to the effect that a decrease of capital stock affects injuriously more parties

and interests than would an increase; increase of capital being generally considered to be beneficial to shareholders and creditors alike—to the former as tending to diminish and not to add to their individual risks; to the latter as increasing the amount of their security. See Green's Brice's *Ultra Vires* 160.

In *Percy v. Millaudon*, *supra*, Judge MARTIN, speaking of the attempted reduction of the capital of the Planters' Bank, says: "Creditors and customers have a claim to the preservation of the capital in its original integrity, for the faith of which they accept the notes of the institution, deposit their money, and lodge paper for collection. So has the public, on account of the advantages which the legislature has stipulated the bank should afford, as a consideration for the immunities and privileges which the charter confers. So have the stockholders, on account of the profits which they have a right to expect on the investments they have respectively made."

I do not understand counsel for defendant to seriously deny that the authority to increase or decrease the amount of capital stock of a corporation must be express; but he claims that to corporations created under the general law, as the Home Insurance Company was, the power to increase or diminish stock is given by section 687, Rev. St. La., which reads:

"It shall be lawful for the stockholders of any corporation, at the general meeting convened for that purpose, to make any modifications, additions, or changes in their act of incorporation, or to dissolve it with the assent of three-fourths of the stock represented at such meeting; any such modification, addition, change, or dissolution shall be recorded as required by the preceding section."

And he contends that his construction of the power given in said section has been sanctioned by long-continued practice and usage among the corporations of the state, and the case proves that a number of leading insurance companies in the city of New Orleans, under such construction, have either increased or decreased their capital stock. Some have done both. The legislative construction of section 687 can be found in the proviso of section 693, "provided that nothing in this act shall be so construed as to authorize an increase in the capital stock of any railroad company." The judicial construction should be found in the reports of adjudged cases, but an examination of the Louisiana Reports shows no case where the question has been raised. It is a fair inference, then, that in every

case where there has been an increase or decrease of capital stock, under authority claimed to be given by section 687, there has been unanimous consent of stockholders and creditors, which makes a very different case from the present one.

While the Louisiana courts have not been called on to determine whether an increase or decrease of the capital stock of a corporation is within the scope of section 687, and there are few if any cases from sister states, the English courts have construed similar provisions against the claimed authority.

In *Smith v. Goldsworthy*, 4 Adol. & E. (N. S.) 430, it was held that a provision "that for the better conduct and management of the affairs of the company, it should be lawful for a special general meeting called for the purpose, from time to time, to amend, alter, or annul, either wholly or in part, all or any of the clauses of the said deed, or of the existing regulations and provisions of the company," did not authorize a reduction of the number and value of the shares of the company. See, also, *Droitwich Patent Salt Co. v. Curzon*, L. R., 3 Exch. 35; *In re Ebbw Vale Steel, etc., Co.*, 4 Ch. Div. 827; *In re Financial Corporation*, (*Holmes' Case*), L. R., 2 Ch. 714; *Society v. Abbott*, 2 Beav. 559. For American cases, see *Granger's Life Ins. Co. v. Kamper*, 73 Ala. 325; *Salem Mill Dam v. Ropes*, 6 Pick. 23.

The power to dissolve does not carry the power to change the capital stock. Reducing the capital stock is practically the dissolution of the company and the organization of a new company. It did appear to me on the hearing that the proposed action of the home company was not a reduction of the capital stock, for the capital and assets of the company are to remain the same. It seems that since the organization the capital has been nominal, to the extent that only by estimation has the actual capital of the company been equal to the par value of the shares, and the proposed action now is but to write off the par value of the shares so that the par value and the estimated value may be equal, the actual capital not being affected—the actual stock being the same after the proposed action as before. It seems clear to me that the writing off the value of shares is such an infringement of the rights of property as can only be accomplished by consent, or a clear power given in the charter. However, I have concluded to treat the case as the parties have presented it, and not from this latter view. It seems perfectly clear

to me that the proposed action of the Home Insurance Company cannot be lawful over the protest of dissenting stockholders.

The injunction issued in the case will be perpetuated in the decree.

Reductions of capital stock of a corporation are not so common as increases thereof. Nevertheless there are a few cases in point.

In *Smith v. Goldswoorthy*, 4 Q. B. 430; 12 L. J., Q. B. 192, the deed of settlement of a company incorporated by a special act declared, that it should be lawful for "a special general meeting to amend, alter or annul, either wholly or in part, any or all of the existing provisions of the deed, and to make any new or other regulations in lieu thereof; and such new regulations should" "be binding and conclusive upon the shareholders." The deed provided that the capital should be 2,000,000*l.*, divided into 20,000 shares of 100*l.* By resolutions, passed and confirmed at meetings duly convened and holden, it was resolved that the capital should be reduced to 1,000,000*l.* in 50*l.* shares. The Court of Queen's Bench held that such reduction was *ultra vires* of the company. DENMAN, C. J., said: "The amount of shares is properly part of the constitution of the company, and does not strictly depend upon any clause, resolution or provision of the deed. The alteration of shares seems, therefore, not to come within the meaning of the 29th clause (above quoted). * * * The defendant further argues that the effect of the resolution reducing the shares was to dissolve the company. We do not think any such effect followed, but rather that they were simply void and inoperative. We think the shares always were, in point of law, 100*l.* shares."

A similar conclusion is reached in *Droitwich Sut Co. v. Curzon*, L. R., 3 Ex. 42. In this case the capital stock was partially repaid and it was undertaken to replace the repaid capital to

the sum actually paid. KELLY, C. B., in refusing to permit the reduction, said: "If such a proceeding were permitted, the shareholders' liability would be limited not, as was intended, by the amount of their shares, but by the amount of the already paid up portion of their shares. Justice, the language of the act and the intention of the legislature, alike forbid an interpretation which would lead to such a result." It was further decided in this case, that if a new company, formed under a general incorporation act, could not, under that act, reduce its capital stock, an old one coming in to share the benefits of such act could not do so.

In *re Elbow Vale S. I. & C. Co.*, 4 Ch. Div. 829, arose under the English Companies Act of 1867, which empowered a company to reduce its capital, and required the reduction to be confirmed by order of court, and to be registered, &c. The nominal capital of the company was divided into shares of 32*l.* each, all of which were subscribed for. On all the shares (except a few which were paid in full) 23*l.* per share was paid, leaving 3*l.* per share to be called up. The capital having been partially lost through the depreciation of the property which represented it, the company desired to write off the loss, and for that purpose proceeded to take steps under the company act for reducing their nominal capital. They accordingly resolved that the nominal capital should be reduced to a specified amount, and that each 32*l.* share should be reduced to 23*l.* by the extinction of 9*l.* per share, to the intent that the existing liability of 3*l.* per share on all the shares except those fully paid, should be preserved, that is, the new shares were to be deemed full paid to

since the act

the extent of 20*l.*, leaving the 3*l.* still due.

The application was refused on the ground that, as the nominal liability of the stockholders, namely the 3*l.* per share unpaid remained still due, there was in fact no reduction of the nominal capital. JESSEL, M. R., said: "Now, first of all, what does 'reduce its capital' (in the statute) mean, standing alone? I should think it meant an actual reduction. This is not an actual reduction because the capital has been lost. It is merely acknowledging that to be lost which is lost; 9*l.* per share is lost; 3*l.* per share remains to be paid up, and the company wish that 3*l.* to be still called up. All they want is to write off 9*l.* per share as loss. That is not reduction of capital; part of the capital has gone already; it has been reduced by a very unpleasant process. It requires no resolution of the company to do that:" *In re Ebbw Vale S. I. & C. Co.*, 4 Ch. Div. 832.

In *In re Financial Corporation, L. R.*, 2 Ch. 714, the memorandum of association of a company provided that the capital should be 3,000,000*l.*, divided into 30,000 shares of 100*l.* each, "subject to be increased or modified," and the articles gave the board of directors power to divide the shares into shares of smaller amount. The directors exercised such power, and converted each 100*l.* share into five 20*l.* shares. *Held*, that such conversion was unauthorized and void, as not being authorized by the companies act.

It is, however, sometimes desirable that the capital stock of a corporation should be reduced. Accordingly, provision therefor has been made in some states by statute. See New York Statutes, for example (chapter 264, Laws 1878, N. Y.), providing in substance that whenever any company shall desire to call a meeting for "diminishing the amount of its capital stock, notice shall be published and served; a vote of two-

thirds of all the shares of stock shall be necessary; a certificate shall be made and verified showing (1), the amount of capital actually paid in; (2), the amount of debts and liabilities; (3), the amount to which the capital stock shall be diminished; which certificate must be filed, with the approval of the comptroller, to the effect (1), that the reduced capital is enough for the corporate purposes; (2), that it is in excess of all debts and liabilities of the company, exclusive of debts secured by mortgage, and (3), that the actual market value of the stock before reduction was less than par. It will be observed that the objects sought to be obtained by this enactment were the protection of corporate creditors and the assurance of a fund sufficient to carry out the corporate purposes, and that it permits a reduction where either it was originally fixed at too high a sum or has become impaired, so that the nominal exceeds the actual sum. But it does not permit the distribution among stockholders of a sum equal to the difference between the nominal and the reduced capital, although if that sum may be taken out and yet leave capital of the company unimpaired and the creditors secure, it may be divided among shareholders as a surplus entitled to be distributed in dividends. *Strong v. Brooklyn Cross T. Rd. Co.*, 93 N. Y. 426.

And a statute (Gen. Stat. N. H., chap. 354, sect. 6) which authorizes a corporation, at any meeting called for the purpose, to reduce its capital stock and the number of shares therein, does not empower such corporation to effect such reduction by purchasing shares of a particular subscriber; unless a course is adopted which will work exact and even justice to all the owners of stock, the statute is inoperative: *Currier v. Lebanon Slate Co.*, 56 N. H. 262; see also *Gill v. Balis*, 72 Mo. 424; *Chellain v. Republic Life Ins. Co.*, 86 Ill. 220; see also Pennsylvania Statute of 29th April 1874, sect. 23, P. L. 83.

There are not many cases bearing directly on the decrease of corporate stock. But there is a large number where such stock has been increased, and the validity of the proceeding has been passed upon. Incidentally, some of these cases discuss reduction of capital stock. And it is well settled that neither increase nor decrease of capital stock is within the power of the company, except

where authority so to do is expressly conferred. See *N. Y. & N. H. Rd. Co. v. Schuyler*, 34 N. Y. 30; *Knowlton v. Congress, etc., Co.*, 14 Blatch. 364; 103 U. S. 49; *Railway Co. v. Allerton*, 18 Id. 235; *Oldtown Rd. Co. v. Veazie*, 39 Me. 571; *Spring Co. v. Knowlton*, 103 U. S. 49; 57 N. Y. 518.

ADELBERT HAMILTON.

Supreme Court of Michigan.

ATTORNEY-GENERAL v. BOARD OF COUNCILMEN OF THE CITY OF DETROIT.

A statute providing for the appointment in a city of a board of four commissioners to take charge of elections, two members thereof to be selected from each of the two leading political parties of the city, such board to appoint registers and inspectors of election from each of the two leading political parties is unconstitutional, as requiring an unlawful test for the holding of a public office.

Party representation being the main object of such a law, the court cannot treat it as not essential and sustain the commission by allowing the selection of its members without such a test.

The creation by statute of a board of commissioners for a city, having control of all the municipal elections and the appointment of election officers, is unconstitutional, as being a delegation of governmental powers and in violation of the settled principle that all officers exercising powers of government and control over municipal affairs must derive their power and office either from the people directly or from the agents or representatives of the people.

APPLICATION for mandamus.

The opinion of the court was delivered by

CAMPBELL, J.—The attorney-general applies for a mandamus to compel the respondents to take action upon certain nominations made by the mayor of Detroit of four persons, two being Republicans and two being Democrats, to act as a board of commissioners of registration and of election for the city of Detroit. Respondents refused to consider the nominations because they regarded the statute which provides for such board as unconstitutional and invalid. To an order to show cause they interpose that ground of defence. No other question is of much importance in the case. The necessity of an immediate decision, in order to allow time for the action of the city authorities in season for the coming election,

made it impossible for the court to do more than announce its determination, on rendering judgment in favor of respondents, as any oral statement in brief form of the grounds of their action would have been liable to some misapprehension. It was therefore thought best that the members of the court should express their views more formally in writing. The statute in question purports to amend chapter 2 and some sections of chapter 3 of the charter of Detroit, as revised in 1883. Chapter 2, which refers to the registration of voters, is entirely superseded by the present act, as is also so much of chapter 3 as provided for the choice of inspectors of election. The new statute undertakes to provide a board of commissioners to appoint ward registers and inspectors, who are to perform the duties formerly imposed on the boards made up of aldermen and their appointees, and of persons elected by the voters. The board thus provided for is required to be composed of four members holding office for four years, the first board being appointed for one, two, three and four years respectively, so that one vacancy shall be filled each year. They are all to be resident electors of the city, and two members thereof to be from each of the two leading political parties of the said city. They are required, two weeks before the time fixed by law for the meeting of boards of registration of voters, to appoint two qualified electors of each voting district, one from each of the two leading political parties of the said city, to act as registers, and form a district board of registration. The various district boards, sitting together, are to constitute a city board of registration. The board of commissioners are to fill any district vacancies by persons of the same political party to which the absentee belongs. The commissioners are also required to appoint for each voting district two inspectors, one from each of the two political parties "represented in the common council of said city," the electors choosing a third. Vacancies in any board of inspectors are to be filled by *viva voce* vote of the electors, but each vacancy must be filled by a person of the same political party as the absentee. The commissioners also appoint the various clerks of election, but have no immediate part in the work of registration by action or supervision.

The statute makes a number of new provisions upon the subject of registration and election, which were more or less discussed on the argument, but which would only be important if the law were not held to be entirely invalid, as we deem it to be. These several

provisions will not, therefore, be dwelt upon. The invalidity of the statute was chiefly based on the argument upon the illegality of creating a board with such powers as those conferred by the statute, and required to be composed of equal numbers of two political parties appointed as such members, and ineligible without such party connection. Relator insists that the legislature, under its power to pass laws to preserve the purity of elections and guard against abuses of the elective franchise, has discretionary power over the methods, and that, even if the partisan disqualification is improper, the court may treat it as not essential and sustain the commission by allowing the selection of its members without any such test. Neither of these grounds is tenable, in our view of the constitution.

In order to appreciate the bearing of the considerations presented on the case, it will be necessary to make some reference to the general elective system of the constitution itself. It is needless to explain that under that system, the whole scheme of government, in every department, depends upon the action of the qualified voters in their electoral districts. All male citizens of lawful age, and some whose United States citizenship is incomplete, are entitled after a certain term of residence to vote in the township or wards in which they reside. Every vote, for any purpose whatever, is required to be cast in such township or ward. The only exception is in case of soldiers in the field during the war. All legislation imposing restraint or conditions upon voting must conform to the other clauses and provisions of the constitution. No part of that instrument can be allowed to override or destroy any other part. It is also well settled that our state polity recognises and perpetuates local government through various classes of municipal bodies, whose essential character must be respected, as fixed by usage and recognition when the constitution was adopted; and any legislation for that purpose which disregards any fundamental and essential requisites of such bodies has always been regarded as invalid and unconstitutional. There is nothing in the constitution which permits the legislature, under the desire to purify elections, to impose any conditions which will destroy or seriously impede the enjoyment of the elective franchise. And as the right of voting is the same everywhere, it is obvious that the conditions regulating the manner of exercising it must be the same in substance everywhere. The machinery of the government differs in its details in cities, villages, and townships, and of course in methods and officers to administer

the election laws. But it cannot be lawful to create substantial or serious differences in the fundamental rights of citizens of different localities in the exercise of their voting franchises.

It is also a most important principle under our constitutional system that no one shall be affected in any of his legal and political rights by reason of his opinions on political subjects or other matters of individual conscience. The political right to freedom of belief and expression is asserted in the most distinct way, and applies to every privilege which the constitution confers. No one has ever supposed that any new condition could be added to those which the constitution has imposed on the right of suffrage, beyond such as are necessary to guard against double voting, or to prevent its exercise by those who are not legal voters. The only legitimate object of registration laws is to secure a correct list of actually qualified voters. Any attempt to inquire into the sentiments of the voters is not only an abuse, but one which it is the chief purpose of the ballot system to prevent. The ballot is a constitutional method which cannot be changed, and its perpetuation means the security to vote without any inquisition into the voter's opinion of men or measures; and it would be entirely meaningless if the voter's choice of candidates for any office must be made from any particular party or number of parties. But the constitution has made this more specific (although this was hardly necessary), by providing, after giving the form of an official oath, that "no other oath, declaration or test shall be required as a qualification for any office or public trust."

It is manifest that any important function of government comes under one or the other of these heads of "office" or "public trust." The board of registration commissioners consists under this statute of persons holding permanent offices. The district registrars, clerk and inspectors perform functions connected with the most vital and important action of citizens in their capacity as choosers of the officers of government. The constitutional rule covers them all, literally as well as impliedly.

It was urged on the argument that if the term "test" can be held applicable to inquiries into party affiliation, it is equally applicable to those other qualifications often required for public service, such as education, scientific acquirements in surveyors and other specialists, legal knowledge in law officers, and the like. But this is not so. Not only is it evident from the other provisions in this clause that all the exemptions referred to are such as would be appli-

cable in all sorts of offices, but the use of the word "test" is especially significant, because its recognised legal meaning in our constitution is derived from the English test acts, all of which related to matters of opinion, and most of them to religious opinion. Such has been the general understanding of the framers of constitutions. If this were not so, and if the power of the legislature in imposing conditions of office is at the same time only restrained by express clauses applying in terms to officers and to no one else, it would not be difficult for any dominant party controlling the legislature to perpetuate its power until overthrown by revolution. But such discriminations are as repugnant to the rights of voters in selecting as to the rights of those chosen in assuming office, and this clause is but an additional assertion of a principle found in other parts of the constitution, expressed or clearly implied. In the case of *People v. Hurlbut*, 24 Mich. 44, it was not disputed by any of the judges who referred to the matter, that it would not be lawful to confine the choice of officers to particular parties, although two of the judges thought that the provision in that particular case was capable of being eliminated from the statute. And it is claimed, in the present case, that the present law is declared and intended to be non-partisan, and that the board may be chosen without reference to this restriction of party membership.

It is altogether likely that the framers of the law were of opinion that the evils of partisan action, and the temptation to carry it to abusive extremes, would be lessened by requiring that one party should not monopolize the offices, but that two should share them. No one can doubt the advantage of impartiality in public action. But parties, however powerful and unavoidable they may be, and however inseparable from popular government, are not and can not be recognised as having any legal authority as such. The law can not regulate or fix their numbers, or compel or encourage adherence to them. Many good citizens form no permanent party ties, and when elections are close, the effort of each party is to detach votes from the friends of the other. Where there are two parties larger than any other, the success of either is very often gained by coalition with a third one. In local matters party allegiance is not uncommonly laid aside for the time being, so that it cannot be said that any party is represented in the election. However well meant such a statute as that before us may be, it distinctly makes party adhesion a condition of office; and not only so, but it puts all but

the two favored parties beyond the possibility of representation, if the law is obeyed.

It is equally clear that this party representation is the essential purpose of the law and that the other changes are merely subsidiary. There are some changes in detail, but the main purpose can not be mistaken. The partisan qualifications are made emphatic in regard to all the offices. It is impossible for any candid person to read the act and believe that the real legislative design can be carried out, by leaving the councilmen and mayor at liberty to choose commissioners from a single party, or for the commissioners to appoint registers and inspectors without distinction of party, at their pleasure, and it would need no great sagacity to see that if such unlimited power were vested in a body made up as this body might then be constituted, all of the old evils would remain, and would be made worse by the absence of any responsibility to the voters of the precincts.

In my judgment, the creation of a board with such powers as are given to this board is quite as serious an infringement of the constitution as the partisan clauses, and much more dangerous. This board is made by the statute the repository of some of the most important powers of government. It has the entire control, directly or indirectly, of the elections on which all the departments of government depend. It has the appointment of officers who can deprive any man of his vote at any election, if they see fit to do so, without any adequate means of redress to save it. While it is unavoidable that a voter's rights at election must, in case of dispute, be disposed of summarily, it is all the more necessary that the tribunal which decides on so sacred a right should be made up in harmony with representative and popular institutions.

While boards are not uncommonly created for the more convenient management of the business interests of the municipalities, it is a principle universally settled in our system that all officers and functionaries exercising power of government and control over political action must derive their power and office either from the people directly, or from the agents or representatives of the people. The officers of towns and cities have always been so created. The discretion of a political body or functionary can not be delegated and sub-delegated indefinitely. Here the choice of ward officers is made, not by the people of the ward, nor by the chosen officers of the city, but by persons who are themselves appointees of a part

of the city government. No doubt there are many ministerial powers which can be deputized. But a governing body cannot deputize others to perform the governing functions, and the legislature cannot authorize it to do so without destroying the character of the corporation which is required to be preserved. It has always been held in this state that the municipalities which can be created by our legislature must be such in substantial character as they have been heretofore known. Up to this time, and ever since elections were first held in Michigan, they have been not only localized in some municipal division, but regarded as municipal action, and supervised and managed by municipal officers, either directly elected, or else appointed by those who have been elected. Such a board as this, which is in no sense a mere agency of the city, is foreign to our system. If it can be created in a city, it can just as well be created in a county, or for the state. When the election ceases to be a municipal procedure, the whole foundation of municipal government drops out. And a municipality which is not managed by its own officers is not such a one as our constitution recognises.

As the defects which have led to a refusal of a mandamus in this case invalidate the whole law, there is no occasion to consider anything else. In my opinion either of them is fatal.

CHAMPLIN and SHERWOOD, JJ., concurred.

MORSE, C. J.—The ostensible primary object of the law under consideration was to preserve the purity of elections and throw additional safeguards around the ballot-box. Such a law should be sustained, unless in plain violation of the letter or spirit of the constitution. Every good citizen, regardless of political belief or party action, ought to and does desire that the right of suffrage shall be amply protected against hindrance or obstruction to the legal voter, as well as against the fraudulent exercise of the elective franchise. The security and permanency of good government also depend upon it. We can take judicial knowledge, I think, that political corruption exists, and that there has been, and is liable to be, a dishonest depositing and an unfair counting of ballots. There is no doubt but legislation is needed to protect and purify the exercise of this, one of the highest privileges of the citizen. The constitutionality of this act, which is in the form of an amendment to the charter of the city of Detroit, was attacked upon the argument in

this court upon four grounds, namely: (1) That it is in conflict with the provision of the constitution that "no law shall embrace more than one object, which shall be expressed in its title. (2) That it violates another provision of the constitution, to wit: "No law shall be revised or altered or amended by reference to its title only; but the act revised, and the section or sections of the act altered or amended, shall be re-enacted and published at length." (3) The form of registration prescribed is not in harmony with the constitutional qualifications of electors in this state. (4) The act is wholly void because of the political tests or qualifications of the registration and inspection of officers.

I am not satisfied that the two first objections are tenable.

As to the third objection, while I believe the form prescribed not applicable to our election laws, and one that would do more harm than good, creating confusion instead of certainty, and having a tendency to hamper and perhaps to prevent the exercise of the elective privilege by the legal voter in certain cases, and therefore unconstitutional, yet, under the rule uniformly applied to statutes, it would not defeat the operation of the remainder of the law, as I regard the form of registration rather as an incident to, than as the main principle of, the act.

The fourth objection to the law, it seems to me is fatal. The act provides, in substance, that the board of councilmen of the city, upon the nomination of the mayor, shall appoint a board of commissioners of registration and election in and for the city of Detroit, who shall consist of four resident electors, and whose term of office shall be four years. This board of commissioners have placed wholly in their hands the appointment of the district boards of registration in every voting precinct in the city. They have also the absolute power of appointment of two of the three election inspectors in every voting district, leaving the electors the poor privilege of choosing the other upon the opening of the polls. Besides defining the powers of said boards of commissioners, registration and election inspectors, the law prescribes the following qualifications of these officers, as follows: "1st. Said board" (of commissioners) "shall be strictly non-partisan in character, two members thereof to be from each of the two leading political parties in said city. 2d. One of said registrars" (district board of registration) "to be from each of the two leading political parties in said city. 3d. One inspector" (of elections) "so appointed, to be from each of the

two political parties represented in the common council of said city."

The law also provides that if any vacancy shall occur in the district registrars or election inspectors, such vacancy shall be filled from the same political party to which the absentee belongs. Sect. 1, art. 7, of our Constitution, prescribes the qualifications of electors. It contains no provision for a registration law; and such a law can only be sustained and upheld under sect. 1, art. 7, of that instrument, which authorizes the legislature to pass laws "to preserve the purity of elections and guard against abuses of the elective franchise." The legislature is utterly powerless to pass any act to hinder or abridge, in the exercise of the electoral right, any person who is an elector under the constitution, except the manifest intent and operation of the law be to protect the legal voters from fraud and abuse of the elective franchise. If a registration law, therefore, is constitutional, it must be so drawn as by its terms to proscribe no man because of his political belief; and the officers whose duty it is to operate the machinery of registration and election, who sit in judgment upon the right of citizens to vote, cannot by law be restricted to any or two political parties.

We must take judicial knowledge of the current undisputed history of our state and country, and act upon the assumption and the fact that there are to-day, at least, in the state of Michigan and in the city of Detroit, four political parties, to wit: Republican, Democratic, National or Greenback, and Union or Prohibition. To confine the registration and election boards to men composed wholly of any one, two or three of these parties, would be a plain violation of the spirit of our constitution, and have a tendency to hamper and abridge the elective rights of those belonging to the political party or parties who, by law, would not and could not have any representation upon such boards. But such a law is also in direct conflict with the plain letter of the constitution. Sect. 1, art. 18, of that instrument, after prescribing the form of the official oath of the members of the legislature, and all officers, executive and judicial, concludes as follows: "And no other oath, declaration or test, shall be required as a qualification for any office or public trust."

In my opinion there can be no doubt but this law subjects the officers of registration and election in Detroit to a political test. If the two leading parties in that city be Democratic and Republican,

then any citizen who cannot, by reason of his political conscience, ally himself with one or the other of these parties, is debarred by law of the right of holding one of these offices. If the National and Prohibition parties should be the two leading ones, then the Republican or Democrat would be ostracised. There can be in a true republican government no political or religious test in holding office, the political and religious liberty of the citizen being at the foundation of republican institutions. If this law had provided in express terms that these various boards should be equally divided between Democrats and Republicans, its repugnance to the constitution would be plainly apparent to all. As it is, it accomplishes by indirect language the same result.

The opinion of Chief Justice CAMPBELL in *People v. Hurlbut*, 24 Mich. 90-92, correctly applies the principle that no person can be prevented from holding office because of his political opinions.

Suppose the legislature should enact a law that the school officers of any city or village in this state should be selected equally from the members of the two leading churches therein, making a religious test, would anyone argue for a moment that such an act was constitutional? And certainly the right of the citizen to his political opinions is and should be as zealously guarded as his right to his religious belief.

It is urged that the political proscription in this law is less than actually takes place without it; that those having the appointing power of registrars and inspectors under the old law do, in Detroit, as a matter of fact, appoint all these officers from one party instead of two, thus precluding still more citizens from these places. In answer it can be said that this is an abuse of power not sanctioned by the law, but permitted, if at all, by its silence, while this act before us puts the seal and stamp of approval upon the very abuse it seeks to cure, and makes it a requisite for these officers to be partisans of a certain name or designation; thus making this evil of partisan appointment a permanent feature of our state polity. For if the legislature has power to require that these offices shall be filled by members of two parties only, it is competent to pass a law that they shall be holden only by the members of the leading party; and a partisan majority in the legislature might fix the political belief of every municipal officer in the state, taking from the people of the locality the right to have a government of a different political color than the legislature. The remedy is worse than the disease.

It is not only political oppression, but a deprivation of a local self-government.

Suppose that in one or more election districts in the city of Detroit, the Nationals and Prohibitionists combined were numerically stronger than the united Republicans and Democrats, though a minority in the whole city. Then, in these days of party coalition, it might be possible for the Democrats and Republicans, controlling the boards of registration and election in the city, and in these wards and districts, to combine against the other two parties in such districts. In such a case there would be naturally the same incentive to and opportunity for frauds and abuses as if all the registrars and inspectors belonged to one party; and it is therefore doubtful if the present law would in all cases have the effect desired.

Suppose, further, the two leading parties in Detroit to be, as they actually are Democratic and Republican. The plurality of these dominant parties over the third party might be so small and trifling in the entire city that in two-thirds or even three-quarters of the wards in the city the third party might have a plurality of votes over either, and yet have no representation except one inspector upon any of these boards, and therefore liable to the same evils that we now deplore.

Again, the inspectors must be of the same political shade as the two leading parties in the common council; and it would not be an unusual thing to have the leading parties in the city not the same as the leading parties in the common council.

The argument might be elaborated further, but it is useless. In any way we turn this law, and apply it to the common every-day occurrences in political life and action at our elections, the more clearly does it appear that this act can have no other effect than a disfranchisement of a large body of the people from holding these offices, simply, because they are politically for the time being in the minority in the whole city. And it should be remembered that all are liable to bear its ostracism. The changes and fluctuations in votes constantly going on, often places the majority at the last election in the minority at the next, and they who wield the club of power under this law to-day may feel themselves its weight to-morrow.

I fully agree in the views so ably expressed by Justice CAMPBELL in the leading opinion filed in this case. The nearer the officers are to the people over whom they have control the more

easily and readily are reached the evils that result from political corruption, and the more speedy and certain the cure. The form of our state government pre-supposes that the people of each locality, each municipal district or political unit, are intelligent and virtuous enough to be fully capable of self-government, and the idea that the further removed the election officers are from the people, the less we encourage fraud and the more nearly we attain virtue at the ballot-box, is not in harmony with the theory and spirit of our institutions. It matters not what legislation has heretofore been adopted in the same road with this law; it is our duty to deal with the encroachment brought before us and to remove it.

The writ of mandamus must be denied.

The principal case is one of general importance. We have been able to find only two other cases directly bearing upon the point involved, viz., the case of *Baltimore v. State*, 15 Md. 464, and the case of *The People v. Hurlbut*, 24 Mich. 44, referred to in the principal case. The principle involved, however, seems very clear. The general doctrine is thus stated by Judge COOLEY, in his work on Constitutional Limitations: "A statute would not be constitutional which should proscribe a class or party for opinion's sake, or which should select particular individuals from a class or locality, and subject them to peculiar rules, or impose upon them special obligations or burdens from which others in the same locality are exempt." In illustration of the first clause of the above quotation, the case of *Baltimore v. State*, *supra*, is cited. That case is an interesting one. The Constitution of Maryland, then in force, contained the following provision: "That no other test or qualification ought to be required on admission to any office of trust or profit, than such oath of office as may be prescribed by the constitution, or by the laws of the state, and a declaration of belief in the Christian religion; and if the party shall profess to be a Jew, the declaration shall be of his belief in a

future state of rewards and punishments." Declaration of Rights, art. 34.

By the 6th section of the Metropolitan Police Law of Baltimore (1859), it was provided, that "no Black Republican, or indorser or supporter of the Helper Book shall be appointed to any office" under the Police Board by it established. The objection to this clause as being unconstitutional was thus summarily disposed of by the court: "That portion of the sixth section which relates to Black Republicans, &c., is obnoxious to the objection urged against it, if we are to consider that class of persons as proscribed on account of their political or religious opinions." The court then very disingenuously evaded the question by saying: "But we cannot understand officially who are meant to be affected by the proviso, and therefore cannot express a judicial opinion on the question;" a conclusion which Judge COOLEY very justly criticises as follows:

"This does not seem to be a very satisfactory disposition of so grave a constitutional objection to a legislative act. That courts may take judicial notice of the fact that the electors of the country are divided into parties with well-known designations, cannot be doubted; and when one of these is proscribed by a name familiarly applied to it by its opponents.

the inference that it is done because of political opinion seems too conclusive to need further support than that which is found in the act itself. And we know no reason why courts should decline to take notice of those facts of general notoriety, which, like the names of political parties, are a part of the public history of the times."

The case of *The People v. Hurlbut*, has a more direct bearing upon the point in question. Among several other important constitutional questions, the question involved in the principal case came up for consideration, and was discussed by the several members of the court; the case, however, was decided upon other grounds.

CHRISTIANCY, J., while seeming to favor the constitutionality of the clause in question, thought the decision of it unnecessary in that case. CAMPBELL, C. J., expressed a clear and forcible opinion against its constitutionality.

COOLEY, J., with reference to this point, among other things, said (page 94): "Nor can the whole act be void because of the provision that the appointees under it shall be members of two certain political parties. That provision, so far as it was designed to control appointments for the future, is simply nugatory, because the legislature on general principles have no power to make party affiliations a qualification for office. But so far as the provision can be regarded as a declaration that the appointees named have been selected because they sustained the specified party relations, we need only say that when a right

of choice exists, an election cannot be held void because of the reasons assigned for the choice made. * * * All that the law can do is to allow freedom of selection by proscribing nobody, and to confer the power of choice upon the persons or body most likely to be governed by correct motives; and the choice thus made must be conclusively presumed to have been made upon the proper grounds."

From what has been above quoted, it will be seen that upon the question as to the right of the legislature to prescribe the political tests in question, the majority of the court who rendered opinions in the case were in harmony, the divergence of opinion taking place upon the question as to the effect of this clause upon the rest of the act.

As to the main question in the principal case, viz., whether the proposed test is unconstitutional or not, we do not see how there can well be any difference of opinion. The decision upon this question seems clearly correct; and to us it seems equally clear that this party representation is the essential purpose of the act, and that the whole act must stand or fall with the clause. This, however, involves another question which we do not propose discussing at this time. The principles governing the question are clear and well settled, and we shall content ourselves by a simple reference to Judge COOLEY's great work on Constitutional Limitations, where the subject will be found fully discussed.

MARSHALL D. EWELL.

Chicago.

*Supreme Court of United States.*NORRINGTON v. WRIGHT ET AL.¹

Under a contract to deliver 5000 tons of iron rails at a specified price per ton, to be shipped at the rate of about 1000 tons per month, settlement cash on presentation of bills, the seller's failure to ship the required quantity in the first month gives the buyer the right to rescind the whole contract.

Such a contract is an entire contract, and the subsidiary provisions as to shipping in different months, and as to paying for each shipment on delivery, do not so split up the contract that a seller in default as to one delivery can insist upon the acceptance of the subsequent deliveries.

The English cases reviewed and the weight of authority held to be in favor of the rule laid down in *Hoare v. Rennie*, 5 H. & N. 19.

IN error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

This was an action of assumpsit brought by Arthur Norrington, a citizen of Great Britain, trading under the name of A. Norrington & Co., against James A. Wright and others, citizens of Pennsylvania, trading under the name of Peter Wright & Sons, upon the following contract :

" Philadelphia, January 19th 1880. Sold to Messrs. Peter Wright & Sons, for account of A. Norrington & Co., London, five thousand (5000) tons old T iron rails, for shipment from a European port or ports, at the rate of about one thousand (1000) tons per month, beginning February 1880, but whole contract to be shipped before August 1st 1880, at forty-five dollars (\$45.00) per ton of 2240 lbs. custom house weight, ex ship Philadelphia. Settlement cash on presentation of bills accompanied by custom-house certificate of weight. Sellers to notify buyers of shipments, with vessel's names, as soon as known by them. Sellers not to be compelled to replace any parcel lost after shipment. Sellers, when possible, to secure to buyers right to name discharging berth of vessels at Philadelphia.

EDWARD J. ETTING,
Metal Broker."

The declaration contained three counts. The first count alleged the contract to have been for the sale of about 5000 tons of T iron rails, to be shipped at the rate of about 1000 tons a month, begin-

¹ See the note to the opinion of the court below in this case, 21 Am. L. Reg. (N. S.) 298 ; and see also the recent case of *Blackburn v. Reilly*, Court of Errors and Appeals of New Jersey, *infra* 59.

ning in February, and ending in July 1880. The second count set forth the contract *verbatim*. Each of these two counts alleged that the plaintiffs, in February, March, April, May, June and July, shipped the goods at the rate of about 1000 tons a month, and notified the shipments to the defendants; and further alleged the due arrival of the goods at Philadelphia, the plaintiff's readiness to deliver the goods and bills thereof, with custom-house certificates of weight, according to the contract, and the defendant's refusal to accept them. The third count differed from the second only in averring that 400 tons were shipped by the plaintiff in February and accepted by the defendants, and that the rest was shipped by the plaintiff at the rate of about 1000 tons a month in March, April, May, June and July. The defendants pleaded *non assumpsit*. The material facts proved at the trial were as follows:

The plaintiff shipped from various European ports 400 tons by one vessel in the latter part of February, 885 tons by two vessels in March, 1571 tons by five vessels in April, 850 tons by three vessels in May, 1000 tons by two vessels in June, and 300 tons by one vessel in July, and notified to the defendants each shipment.

The defendants received and paid for the February shipment upon its arrival in March, and in April gave directions at what wharves the March shipments should be discharged on their arrival; but on May 14th, about the time of the arrival of the March shipments, and having been then for the first time informed of the amounts shipped in February, March and April, gave Etting written notice that they should decline to accept the shipments made in March and April, because none of them were in accordance with the contract; and in answer to a letter from him of May 16th, wrote him on May 17th as follows: "We are advised that what has occurred does not amount to an acceptance of the iron under the circumstances and the terms of the contract. You had a right to deliver in parcels, and we had a right to expect the stipulated quantity would be delivered until the time was up in which that was possible. Both delivering and receiving were thus far conditional on there being thereafter a complete delivery in due time and of the stipulated article. On the assumption that this time had arrived, and that you had ascertained that you did not intend to, or could not, make any further deliveries for the February and March shipments, we gave you the notice that we declined accepting those deliveries. As to April, it is too plain, we suppose, to require any

remark. If we are mistaken as to our obligation for the February and March shipments, of course we must abide the consequences; but if we are right, you have not performed your contract, as you certainly have not for the April shipments. There is then the very serious and much debated question, as we are advised, whether the failure to make the stipulated shipments in February or March has absolved us from the contract. If it does, we of course will avail ourselves of this advantage."

On May 18th, Etting wrote to the defendants, insisting on their liability for both past and future shipments, and saying, among other things: "In respect to the objection that there had not been a complete delivery in due time of the stipulated article, I beg to call your attention to the fact that while the contract is for 5000 tons, it expressly stipulates that deliveries may be made during six months, and that they are only to be at the rate of about 1000 tons per month." "As to April, while it seems to me too plain to require any remark, I do not see how it can seem so to you, unless you intend to accept the rails. If you object to taking all three shipments made in that month, I shall feel authorized to deliver only two of the cargoes, or for that matter, to make the delivery of precisely 1000 tons. But I think I am entitled to know definitely from you whether you intend to reject the April shipments, and if so, upon what ground, and also whether you are decided to reject the remaining shipments under the contract. You say in your last paragraph that you shall avail yourselves of the advantage, if you are absolved from the contract, but as you seem to be in doubt whether you can set up that claim or not, I should like to know definitely what is your intention."

On May 19th, the defendants replied: "We do not read the contract as you do. We read it as stipulating for monthly shipments of about 1000 tons, beginning in February, and that the six months' clause is to secure the completion of whatever had fallen short in the five months. As to the meaning of 'about,' it is settled as well as such a thing can be, and certainly neither the February, March, or April shipments are within the limits." "As to the proposal to vary the notices for April shipments, we do not think you can do this. The notice of the shipments, as soon as known, you were bound to give, and cannot afterward vary it if they do not conform to the contract. Our right to be notified immediately that the shipments were known is as material a provision as any other, nor can

it be changed now in order to make that a performance which was no performance within the time required." "You ask us to determine whether we will or will not object to receive further shipments because of past defaults. We tell you we will if we are entitled to do so. We do not think you have the right to compel us to decide a disputed question of law to relieve you from the risk of deciding it yourself. You know quite as well as we do what is the rule and its uncertainty of application."

On June 10th, Etting offered to the defendants the alternative of delivering to them 1000 tons, strict measure, on account of the shipments in April. This offer they immediately declined.

On June 15th, Etting wrote to the defendants that two cargoes, amounting to 221 tons, of the April shipments, and two cargoes, amounting to 650 tons, of the May shipments (designated by the names of the vessels), had been erroneously notified to them, and that about 900 tons had been shipped by a certain other vessel on account of the May shipments. On the same day the defendants replied that the notification as to April shipments could not be corrected at this late date, and after the terms of the contract had long since been broken.

From the date of the contract to the time of its rescission by the defendant, the market price of such iron was lower than that stipulated in the contract, and was constantly falling. After the arrival of the cargoes, and their tender and refusal, they were sold by Etting, with the consent of the defendants, for the benefit of whom it might concern.

At the trial the plaintiff contended—1. That under the contract he had six months in which to ship 5000 tons, and any deficiency in the earlier months could be made up subsequently, provided that the defendants could not be required to take more than 1000 tons in any one month. 2. That, if this was not so, the contract was a divisible contract, and the remedy of the defendants for a default in any month was not rescission of the whole contract, but only by deduction of the damages caused by the delays in the shipments on the part of the plaintiff.

But the court instructed the jury that if the defendants, at the time of accepting the delivery of the cargo paid for, had no notice of the failure of the plaintiff to ship about 1000 tons in the month of February, and immediately upon learning that fact gave notice of their intention to rescind, the verdict should be for them.

The plaintiff excepted to this instruction, and, after verdict and judgment for the defendants, sued out this writ of error.

Samuel Dickson and John C. Bullitt, for plaintiff in error.

R. C. McMurtrie, for defendants in error.

The opinion of the court was delivered by

GRAY, J. (after stating the facts as above).—In the contracts of merchants, time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded, as a warranty, in the sense in which that term is used in insurance and maritime law; that is to say, a condition precedent upon the failure or non-performance of which the party aggrieved may repudiate the whole contract: *Behn v. Burness*, 3 B. & S. 751; *Bowes v. Shand*, 2 App. Cas. 455; *Lowber v. Bangs*, 2 Wall. 728; *Davison v. Von Tingen*, 113 U. S. 40.

The contract sued on is a single contract for the sale and purchase of 5000 tons of iron rails, shipped from a European port or ports for Philadelphia. The subsidiary provisions as to shipping in different months, and as to paying for each shipment upon its delivery, do not split up the contract into as many contracts as there shall be shipments or deliveries of so many distinct quantities of iron: *Mersey Co. v. Naylor*, 9 App. Cas. 484, 489. The further provision, that the sellers shall not be compelled to replace any parcel lost after shipment, simply reduces, in the event of such loss, the quantity to be delivered and paid for.

The times of shipment, as designated in the contract, are "at the rate of about 1000 tons per month, beginning February 1880, but whole contract to be shipped before August 1st, 1880. These words are not satisfied by shipping one-sixth part of the 5000 tons, or about 833 tons, in each of the six months which begin with February and end with July. But they require about 1000 tons to be shipped in each of the five months from February to June inclusive, and allow no more than slight and unimportant deficiencies in the shipments during those months to be made up in July. The contract is not one for the sale of a lot of goods, identified by inde-

pendent circumstances, such as all those deposited in a certain warehouse, or to be shipped in a particular vessel, or that may be manufactured by the seller, or may be required for use by the buyer, in a certain mill—in which case the mention of the quantity, accompanied by the qualification of “about,” or “more or less,” is regarded as a mere estimate of the probable amount, as to which good faith is all that is required of the party making it. The contract before us comes within the general rule: “When no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material, and governs the contract. The addition of the qualifying words ‘about,’ ‘more or less,’ and the like, in such cases, is only for the purpose of providing against accidental variations, arising from slight and unimportant excesses or deficiencies in number, measure or weight:” *Brooklyn v. United States*, 96 U. S. 168, 171, 172.

The seller is bound to deliver the quantity stipulated, and has no right either to compel the buyer to accept a less quantity or to require him to select part out of a greater quantity; and when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month, gives the buyer the same right to rescind the whole contract, that he would have had if it had been agreed that all the goods should be delivered at once.

The plaintiff, instead of shipping about 1000 tons in February and about 1000 tons in March, as stipulated in the contract, shipped only 400 tons in February, and 885 tons in March. His failure to fulfil the contract on his part in respect to these first two instalments, justified the defendants in rescinding the whole contract, provided they distinctly and seasonably asserted the right of rescission.

The defendants, immediately after the arrival of the March shipments, and as soon as they knew that the quantities which had been shipped in February and in March were less than the contract called for, clearly and positively asserted the right to rescind, if the law entitled them to do so. Their previous acceptance of the single cargo of 400 tons shipped in February was no waiver of this right, because it took place without notice, or means of knowledge, that the stipulated quantity had not been shipped in February. The price paid by them for that cargo being above the

market value, the plaintiff suffered no injury by the omission of the defendants to return the iron; and no reliance was placed on that omission in the correspondence between the parties.

The case wholly differs from that of *Lyon v. Bertram*, 20 How. 149, in which the buyer of a specific lot of goods accepted and used part of them with full means of previously ascertaining whether they conformed to the contract.

The plaintiff, denying the defendants' right to rescind, and asserting that the contract was still in force, was bound to show such performance on his part as entitled him to demand performance on their part, and, having failed to do so, cannot maintain this action.

For these reasons we are of opinion that the judgment below should be affirmed. But as much of the argument at the bar was devoted to a discussion of the recent English cases, and as a diversity in the law, as administered on the two sides of the Atlantic, concerning the interpretation and effect of commercial contracts of this kind, is greatly to be deprecated, it is proper to add, that upon a careful examination of the cases referred to they do not appear to us to establish any rule inconsistent with our conclusion.

In the leading case of *Hoare v. Rennie*, 5 H. & N. 19, which was an action upon a contract of sale of 667 tons of bar iron, to be shipped from Sweden in June, July, August and September, and in about equal portions each month, at a certain price payable on delivery, the declaration alleged that the plaintiffs performed all things necessary to entitle them to have the contract performed by the defendants, and were ready and willing to perform the contract on their part, and in June shipped a certain portion of the iron, and within a reasonable time afterwards offered to deliver to the defendants the portion so shipped, but the defendants refused to receive it, and gave notice to the plaintiffs, that they would not accept the rest. The defendants pleaded that the shipment in June was of about twenty tons only, and that the plaintiffs failed to complete the shipment for that month according to the contract. Upon demurrer to the pleas, it was argued for the plaintiffs that the shipment of about one-fourth of the iron in each month was not a condition precedent, and that the defendants' only remedy for a failure to ship that quantity was by a cross action. But judgment was given for the defendants, Chief Baron POLLOCK saying: "The defendants refused to accept the first shipment, because, as

they say, it was not a performance, but a breach of the contract. Where parties have made an agreement for themselves, the courts ought not to make another for them. Here they say that in the events that have happened, one-fourth shall be shipped in each month, and we cannot say that they meant to accept any other quantity. At the outset the plaintiffs failed to tender the quantity according to the contract; they tendered a much less quantity. The defendants had a right to say that this was no performance of the contract, and they were no more bound to accept the short quantity than if a single delivery had been contracted for. Therefore the pleas are an answer to the action:" 5 H. & N. 28. So in *Coddington v. Paleologo*, L. R., 2 Ex. 193, while there was a division of opinion upon the question whether a contract to supply goods "delivering on April 17th, complete 8th May," bound the seller to begin delivering on April 17, all the judges agreed that if it did, and the seller made no delivery on that day, the buyer might rescind the contract.

On the other hand in *Simpson v. Crippin*, L. R., 8 Q. B. 14, under a contract to supply from 6000 to 8000 tons of coal, to be taken by the buyers' wagons from the seller's colliery in equal monthly quantities for twelve months, the buyer sent wagons for only 150 tons during the first month, and it was held that this did not entitle the seller to annul the contract and decline to deliver any more coal, but that his only remedy was by an action for damages. And in *Brandt v. Lawrence*, 1 Q. B. Div. 344, in which the contract was for the purchase of 4500 quarters, ten per cent. more or less, of Russian oats, "shipment by steamer or steamers during February," or, in case of ice preventing shipment, then immediately upon the opening of navigation, and 1139 quarters were shipped by one steamer in time, and 3361 quarters were shipped too late, it was held that the buyer was bound to accept the 1139 quarters, and was liable to an action by the seller for refusing to accept them.

Such being the condition of the law of England as declared in the lower courts, the case of *Bowes v. Shand*, after conflicting decisions in the Queen's Bench Division and the Court of Appeal, was finally determined by the House of Lords: 1 Q. B. D. 470; 2 Id. 112; 2 App. Cas. 455.

In that case, two contracts were made in London, each for the sale of 300 tons of "Madras rice, to be shipped at Madras or coast,

for this port, during the months of March and (or) April, 1874, per Rajah of Cochin." The 600 tons filled 8200 bags, of which 7120 bags were put on board and bills of lading signed in February; and for the rest, consisting of 1030 bags put on board in February, and 50 in March, the bill of lading was signed in March. At the trial of an action by the seller against the buyer for refusing to accept the cargo, evidence was given that rice shipped in February would be the spring crop, and quite as good as the rice shipped in March or April. Yet the House of Lords held that the action could not be maintained, because the meaning of the contract, as apparent upon its face, was that all the rice must be put on board in March and April, or in one of those months.

In the opinions there delivered the general principles underlying this class of cases are most clearly and satisfactorily stated. It will be sufficient to quote a few passages from two of those opinions.

Lord Chancellor CAIRNS said: "It does not appear to me to be a question for your lordships, or for any court, to consider whether that is a contract which bears upon the face of it some reason, some explanation why it was made in that form, and why the stipulation is made that the shipment should be during these particular months. It is a mercantile contract, and merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance:" 2 App. Cas. 463. "If it be admitted that the literal meaning would imply that the whole quantity must be put on board during a specified time, it is no answer to that literal meaning, it is no observation which can dispose of, or get aid of, or displace that literal meaning, to say that it puts an additional burden on the seller, without a corresponding benefit to the purchaser; that is a matter of which the seller and the purchaser are the best judges. Nor is it any reason for saying that it would be a means by which purchasers, without any real cause, would frequently obtain an excuse for rejecting contracts when prices had dropped. The non-fulfilment of any term in any contract is a means by which a purchaser is able to get rid of the contract when prices have dropped; but that is no reason why a term which is found in a contract should not be fulfilled:" pp. 465, 466. "It was suggested that even if the construction of the contract be as I have stated, still if the rice was not put on board in the particular months, that would not be a reason which would justify the appellants in having rejected the rice altogether, but

that it might afford a ground for a cross-action by them if they could show that any particular damage resulted to them from the rice not having been put on board in the months in question. My lords, I cannot think that there is any foundation whatever for that argument. If the construction of the contract be as I have said that it bears, that the rice is to be put on board in the months in question, that is part of the description of the subject-matter of what is sold. What is sold is not 300 tons of rice in gross or in general. It is 300 tons of Madras rice, to be put on board at Madras during the particular months." "The plaintiff, who sues upon that contract has not launched his case until he has shown that he has tendered that thing which has been contracted for, and if he is unable to show that, he cannot claim any damages for the nonfulfilment of the contract:" 467, 468.

Lord BLACKBURN said: "If the description of the article tendered is different in any respect, it is not the article bargained for, and the other party is not bound to take it. I think in this case what the parties bargained for was rice, shipped at Madras or the coast of Madras. Equally good rice might have been shipped a little to the north or a little to the south of the coast of Madras. I do not quite know what the boundary is, and probably equally good rice might have been shipped in February as was shipped in March, or equally good rice might have been shipped in May as was shipped in April, and I dare say equally good rice might have been put on board another ship as that which was put on board the *Rajah of Cochin*. But the parties have chosen, for reasons best known to themselves, to say: We bargain to take rice, shipped in this particular region, at that particular time, on board that particular ship, and before the defendants can be compelled to take anything in fulfilment of that contract, it must be shown not merely that it is equally good, but that it is the same article as they have bargained for—otherwise they are not bound to take it:' 2 App. Cas. 480, 481.

Soon after that decision of the House of Lords two cases were determined in the Court of Appeal. In *Reuter v. Sala*, 4 C.P.D. 239, under a contract for the sale of "about twenty-five tons (more or less) black pepper, October and (or) November shipment, from Penang to London, the name of the vessel or vessels, marks and full particulars to be declared to the buyer in writing within sixty days from date of bill of lading," the seller, within the sixty days

declared twenty-five tons by a particular vessel, of which only twenty tons were shipped in November, and five tons in December; and it was held that the buyer had the right to refuse to receive any part of the pepper. In *Houck v. Muller*, 7 Q. B. D. 92, under a contract for the sale of 2000 tons of pig iron, to be delivered to the buyer free on board, at the maker's wharf "in November, or equally over November, December and January next," the buyer failed to take any in November, but demanded delivery of one-third in December, and one-third in January; and it was held that the seller was justified in refusing to deliver, and in giving notice to the buyer that he considered the contract as cancelled by the buyer not taking any iron in November.

The plaintiff in the case at bar greatly relied on the very recent decision of the House of Lords in *Mersey Co. v. Naylor*, 9 App. Cas. 434, affirming the judgment of the Court of Appeal in 9 Q. B. D. 648, and following the decision of the Court of Common Pleas in *Freeth v. Burr*, L. R., 9 C. P. 208.

But the point there decided was that the failure of the buyer to pay for the first instalment of the goods upon delivery, does not, unless the circumstances evince an intention on his part to be no longer bound by the contract, entitle the seller to rescind the contract and to decline to make any further deliveries under it. And the grounds of the decision, as stated by Lord Chancellor SELBORNE, in moving judgment in the House of Lords, are applicable only to the case of a failure of the buyer to pay for, and not to that of a failure of the seller to deliver, the first instalment.

The Lord Chancellor said: "The contract is for the purchase of 5000 tons of steel blooms of the company's manufacture; therefore it is one contract for the purchase of that quantity of steel blooms. No doubt there are subsidiary terms in the contract as to the time of delivery. 'Delivery 1000 tons monthly commencing January next;' and as to the time of payment, 'Payment net cash within three days after receipt of shipping documents;' but that does not split up the contract into as many contracts as there shall be deliveries for the purpose, of so many distinct quantities of iron. It is quite consistent with the natural meaning of the contract, that it is to be one contract for the purchase of that quantity of iron to be delivered at those times and in that manner, and for which payment is so to be made. It is perfectly clear that no particular payment can be a condition precedent of the entire contract, because the

delivery under the contract was most certainly to precede payment; and that being so, I do not see how, without express words, it can possibly be made a condition precedent to the subsequent fulfilment of the unfulfilled part of the contract, by the delivery of the undelivered steel :'' 9 App. Cas. 439.

Moreover, although in the Court of Appeal *dicta* were uttered tending to approve the decision in *Simpson v. Crippin*, and to disparage the decisions in *Hoare v. Rennie* and *Houck v. Muller*, above cited, yet in the House of Lords *Simpson v. Crippin* was not even referred to, and Lord BLACKBURN, who had given the leading opinion in that case, as well as Lord BRAMWELL, who had delivered the leading opinion in *Houck v. Muller*, distinguished *Hoare v. Rennie* and *Houck v. Muller* from the case in judgment: 9 App. Cas. 444, 446.

Upon a review of the English decisions, the rule laid down in the earlier cases of *Hoare v. Rennie*, and *Coddington v. Paleologo*, as well as in the later cases of *Reuter v. Sala*, and *Houck v. Muller*, appears to us to be supported by a greater weight of authority than the rule stated in the intermediate cases of *Simpson v. Crippin* and *Brandt v. Lawrence*, and to accord better with the general principles affirmed by the House of Lords in *Bowes v. Shand*, while it in nowise contravenes the decision of that tribunal in *Mersey Co. v. Naylor*.

In this country, there is less judicial authority upon the question. The two cases most nearly in point, that have come to our notice, are *Hill v. Blake*, 97 N. Y. 216, which accords with *Bowes v. Shand*, and *King Philip Mills v. Slater*, 12 R. I. 82, which approves and follows *Hoare v. Rennie*. The recent cases in the Supreme Court of Pennsylvania, cited at the bar, support no other conclusion. In *Shinn v. Bodine*, 60 Penn. St. 182, the point decided was that a contract for the purchase of 800 tons of coal at a certain price per ton, "coal to be delivered on board vessels as sent for during months of August and September," was an entire contract, under which nothing was payable until delivery of the whole, and therefore the seller had no right to rescind the contract upon a refusal to pay for one cargo before that time. In *Morgan v. McKee*, 77 Penn. St. 228, and in *Scott v. Kittanning Coal Co.*, 89 Id. 231, the buyer's right to rescind the whole contract upon the failure of the seller to deliver one instalment, was denied, only because that right had been waived, in the one case by unreason-

able delay in asserting it, and in the other by having accepted, paid for and used a previous instalment of the goods. The decision of the Supreme Judicial Court of Massachusetts, in *Winchester v. Newton*, 2 Allen 492, resembles that of the House of Lords in *Mersey Co. v. Naylor*.

Being of opinion that the plaintiff's failure to make such shipments in February and March as the contract required prevents his maintaining this action, it is needless to dwell upon the further objection that the shipments in April did not comply with the contract, because the defendants could not be compelled to take about 1000 tons out of the larger quantity shipped in that month, and the plaintiff, after once designating the names of vessels, as the contract bound him to do, could not substitute other vessels. See *Busk v. Spence*, 4 Camp. 329; *Graves v. Legg*, 9 Exch. 709; *Reuter v. Sala*, above cited.

Judgment affirmed.

The Chief Justice was not present at the argument and took no part in the decision of this case.

Court of Errors and Appeals of New Jersey.

BLACKBURN v. REILLY.¹

Upon a contract of sale to be performed not by single acts of delivery and payment, but by a series of deliveries and payments at stated intervals, defaults by one party in making particular deliveries or payments will not release the other party unless the conduct of the party in default be such as to evince an intention to abandon the contract, or a design no longer to be bound by its terms.

Plaintiff agreed to deliver to defendant 52 car-loads of bark, at \$18 a ton, to be delivered at the rate of one car-load per week. Plaintiff delivered five car-loads. Defendant paid for these, but subsequently discovered the bark to be defective in quality, and refused to receive any more. Held, that the defective quality of the bark delivered did not release defendant from his obligation to accept and pay for the remaining car-loads.

Mersey Steel and Iron Co. v. Naylor, 9 App. Cas. 434, followed.

In case. In error to the Essex Circuit Court.

Blackburn, the plaintiff below, a Virginia dealer in bark, entered into a contract on May 13th 1882, to sell to the defendant below, Reilly, a Newark tanner, for use in his business, 52 car-loads of

¹ See *Norrington v. Wright*, *supra*, page 47.

bark, at the price of \$18 a ton, to be delivered at the rate of one car load per week until the whole should have been delivered. Under this contract five car-loads were actually delivered. This was stored by Reilly in a loft over his tannery with other bark. It was all paid for at the contract price by July 3d, 1882, but none of it was used until July 15th. Reilly claims that it was then found to be musty, lumpy, and unfit for the purpose for which it had been bought; and shortly after Reilly notified Blackburn not to send any more—first by mail, alleging that he was overcrowded, and shortly afterwards in a personal interview, alleging its unmerchantable condition.

In January, 1883, and before the expiration of the year within which the bark was to have been delivered, Blackburn brought suit, setting forth the above contract and the breach of it. The defendant pleaded the general issue. Before trial, however, the parties came to an understanding, and made an agreement in writing, dated March 27th, 1883, which was delivered on April 4th, 1883. By its terms it was stipulated that the contract for the breach of which suit had been brought should be completed by the delivery by Blackburn of a sufficient number of car loads of bark to make, with what had already been delivered, 52 car loads, at the price of \$17 per ton, payable on delivery of each car load. This new agreement then went on to provide as follows: "(4) One car load only shall be delivered during each week after shipments shall begin, and said shipments shall begin on the first day of April next, or within ten days thereafter." "(6) This suit shall not be discontinued or *non prossed* until the final completion of this contract. The plaintiff shall then discontinue it without costs. But in case of a breach of this contract by said Reilly, the plaintiff may proceed in this suit by requiring the defendant to plead, and the suit shall proceed thereon to trial, and the damages to be recovered shall be measured by the original contract sued on. Said Reilly shall, on the execution hereof, pay the taxed costs of the plaintiff. It is understood that this suit is not settled unless the terms of this contract are faithfully carried out by said Reilly."

Blackburn did not deliver any bark within the 10 days stipulated, or subsequently. Reilly, on his part, tendered the costs on April 21st, and gave notice that he would not receive any bark under the contract because of the lapse of time. The tender was refused, and Blackburn insisted on proceeding in the original suit. Reilly

then pleaded *puis darrein continuance*, two additional pleas setting forth the new agreement, Blackburn's failure to deliver under it, and Reilly's tender of costs, to which Blackburn demurred, and judgment was given in favor of the demurrant. The case then went to trial on the general issue as originally pleaded; the damages claimed being damages for the breach of the first agreement. The defence interposed was that the delivery of five loads of unmerchantable bark justified the defendant in refusing to receive any more bark under the contract. This defence was overruled by the court, and the plaintiff had judgment. Exceptions being sealed for the defendant, he brought this writ of error.

Mr. Coult, for plaintiff.

Mr. Stevens, for defendant.

The opinion of the court was delivered by

DIXON, J.—The first question for decision on this writ of error is whether the pleas *puis darrein continuance* were good. They were pleaded in bar of the action, and a prime requisite of such pleas is that they shall allege facts which form a conclusive answer to the action, and entitle the defendant to a final judgment in the cause. 1 Chit. Pl. 525. The express terms of the contract relied on in these pleas show that nothing growing out of and dependent upon that agreement could have this broad effect in favor of the defendant. According to its provisions, the defendant was forthwith to pay the costs of this suit. In case he failed to comply with its stipulations, the suit was to proceed as if the contract had not been made; and if he fully performed it, the plaintiff was to discontinue the suit without costs. So that the effect upon the pending litigation which could result from circumstances the most favorable to the defendant was that the plaintiff could be compelled to discontinue it without costs. That is quite different from the judgment for defendant to be rendered upon a good plea in bar which would award costs to the defendant, and be conclusive in his favor upon all subsequent litigation involving the same issues. It is evident that the effect which the parties intended to produce on the pending suit by force of this agreement could be properly secured only by motion, not by plea. The demurrer to these pleas was good.

The other question discussed on the argument was whether the defendant had the right to refuse to receive any more bark in case

he could satisfy the jury that the five loads of bark delivered were not equal in quality to the requirements of the contract. The contract provided that the plaintiff should deliver, and the defendant should receive, one car-load of bark weekly for a year at \$18 a ton, payable on delivery. It belongs to a class of agreements sometimes called continuing contracts of sale, because they are to be completely performed, not by single acts of delivery and payment, but by a series of such acts at stated intervals. The rule to be applied in determining whether the express obligations of such contracts remain after one or more breaches by either party has been the subject of much discussion of late years, and has given rise to some contrariety of judicial opinion. We do not feel constrained by the phases of the present case to enter at any length upon the details of this discussion. In our opinion the rule established in England by the judgment of the House of Lords in *Mersey Steel & Iron Co. v. Naylor*, 9 App. Cas. 434, affirming the judgment of the Court of Appeals in s. c. 9 Q. B. Div. 648, is one which in ordinary contracts of this nature will work out results most conformable to reason and justice. The rule is that defaults by one party in making particular payments or deliveries will not release the other party from his duty to make the other deliveries or payments stipulated in the contract, unless the conduct of the party in default be such as to evince an intention to abandon the contract, or a design no longer to be bound by its terms. This rule leaves the party complaining of a breach to recover damages for his injury on the normal principle of compensation, without allowing him the abnormal advantage that might enure to him from an option to rescind the bargain. It also accords with the ancient doctrine laid down by Serjeant Williams in his notes to *Pordage v. Cole*, 1 Saund. 320b, that where a covenant (of the plaintiff) goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the contract on the part of the defendant without averring performance in the declaration. It of course is inapplicable where the parties have expressed their intention to make performance of a stipulation touching a part of the bargain a condition precedent to the continuing obligation of the contract; and peculiar cases might arise where the courts would infer such an intention from the nature and circumstances of the bargain itself, cases in which the courts would see that the partial

stipulation was so important, so went to the root of the matter (to use a phrase of BLACKBURN, J., in *Poussard v. Spiers*, 1 Q. B. Div. 410), as to make its performance a condition of the obligation to proceed in the contract.

The case in hand is one of ordinary character, and therefore the question under the rule is whether the circumstances would warrant an inference by the jury that the plaintiff purposed to abandon the contract, or no longer to be bound by its terms. This question is, we think, not doubtful. The plaintiff had delivered five car-loads, which had been accepted and paid for by the defendant without any intimation that they were not satisfactory; was ready to deliver the sixth when the defendant requested delay; and was prevented from further deliveries only by the peremptory refusal of the defendant to receive any more. Against this refusal the plaintiff protested, then proposed an arbitration, and threatened suit if the defendant should persist, and finally brought this action for damages. In the face of all this there is not a shadow of reason for saying that the plaintiff had abandoned or repudiated the contract. If the five deliveries of defective bark had been made against notice and remonstrance, it might have suggested the idea that the plaintiff meant to disregard his obligations; but by the defendant's acceptance of and payment for the bark without objection this ground for a possible inference of repudiation is wanting in the case. We regard it as incontestable that the deliveries were made in recognition of the binding force of the agreement. The defendant, therefore was not discharged. *Cahen v. Platt*, 69 N. Y. 348, was precisely like the case before us. The plaintiff had agreed to sell the defendant glass, to be delivered in instalments. He had made several deliveries, which had been accepted and paid for by the defendant. Subsequently the defendant complained of the quality, and refused to receive any more. The suit was for damages resulting from the refusal, and the plaintiff recovered. *Scott v. Kittanning Coal Co.*, 89 Penn. St. 231, was also similar; but there the defendant contended that the conduct of the plaintiff in the delivery of the defective coal was fraudulent, yet the court held the defendant would not be thereby discharged.

There was no error in the ruling of the trial justice on this proffered defence. The judgment below should be affirmed.

Supreme Judicial Court of Massachusetts.

NORCROSS v. JAMES.

Covenants running with the land may be divided into two classes, viz., those annexed to the estate, such as the ancient warranty now represented by the usual covenants for title, and those which are attached to the land itself, such as rights of common or easements.

Covenants of the latter class, in order to be enforceable against the assignees of the covenantor, must "touch and concern," or "extend to the support of" the land conveyed.

A covenant in a deed for land containing a quarry that the grantor will not open or work or allow to be opened or worked, any quarry on a certain farm then owned by the grantor adjoining the land conveyed, is not such a covenant as may be enforced against the assigns of the grantor.

THIS was a bill in equity to restrain the defendants from the breach of a covenant in a deed from one Luke Kibbe, Jr., to William N. Flynt. The case was reported to the full bench of the Supreme Court on an agreed statement of facts, in which it appeared that one of the inducements of the purchase of the estate was the valuable quarry of marble it contained, and the covenant the deed contained restraining the quarrying of marble on the adjoining land. The plaintiff contended that the covenant was one that ran with the land, and, as such, was binding on the heirs and assigns of the covenantor, in favor of the heirs and assigns of the covenantee. The defendant contended that it was personal, and that it was also void, as being in restraint of trade. The material facts appear in the opinion.

James G. Dunning, for the plaintiff.

Charles L. Long, for the defendant.

The opinion of the court was delivered by

HOLMES, J.—One Kibbe conveyed to one Flynt a valuable quarry of six acres, bounded by other land of the grantor, with covenants as follows: "And I do for myself, my heirs, executors and administrators, covenant with the said Flynt, his heirs and assigns, that I am lawfully seised in fee of the afore-granted premises, that they are free of all incumbrances, that I will not open or work, or allow any person or persons to open or work, any quarry or quarries on my farm or premises in said Long Meadow." By mesne conveyance the plaintiffs have become pos-

sessed of the quarry conveyed to Flynt, and the defendants of the surrounding land referred to in the covenant. The defendants are quarrying stone in their land like that quarried by the plaintiffs and the plaintiffs bring their bill for an injunction.

The discussion of the question under what circumstances a landowner is entitled to rights created by way of covenant with a former owner of the land has been much confused since the time of Lord COKE, by neglecting a distinction, which he stated with perfect clearness, between those rights which run only with the estate in the land, and those which are said to be attached to the land itself.

"So note a diversity between a use or warranty, and the like things annexed to the estate of the land in privity, and commons, advowsons, and other hereditaments annexed to the possession of the land:" *Chudleigh's Case*, 1 Rep. 122 b.; s. c. Popham 70, 71.

Rights of the class represented by the ancient warranty, and now by the usual covenants for title, are pure matters of contract, and from a very early date down to comparatively modern times lawyers have been perplexed with the question, How an assignee could sue upon a contract to which he was not a party (West, Symboleog. I. sect. 35; Wingate's Maxims 44, pl. 20, 55, pl. 10; Co. Litt., 117a; *Sir Moyle Finch's Case*, 4 Inst. 85). But an heir could sue upon a warranty of his ancestor, because for that purpose he was *eadem persona cum antecessore*. (See Y. B., 20 & 21 Ed. I., 232 (Rolls ed.); *Oates v. Fröh*, Hob. 180; *Bain v. Cooper*, 1 Dowl. Pr. Cas. N. S. 11, 14). And the conception was gradually extended in a qualified way to assigns where they were mentioned in the deed; Bract. fol. 17 b; 67 a, 380 d; 381; Fleta. III. chap. 14, sect. 6; 1 Britton (Nich.) 255, 256; Y. B., 20 Ed. I. 232-234 Roll's ed.); Fitz. Abr. *Covenant*, pl. 28; Vin. Abr. *Voucher* N, p. 59; Y. B. 14 H. 4, 56; 20 H. 6, 34 b; Old Natura Brevium, *Covenant*, 67, B. C. in Rastell's Law Tracts, ed. 1534; Dr. and Student, I., chap. 8; F. N. B. 145 c; Co. Litt., 384 b; Corn. Dig. *Covenant*, B 3; *Middlemore v. Goodale*, Cro. Car. 503; s. c. Id. 505; W. Jones 406; *Philpot v. Hoare*, 2 Atk. 219. But in order that an assignee should be so far identified in law with the original covenantee, he must have the same estate, that is, the same status or inheritance, and thus the same *persona quoad* the contract. But as will be seen, the privity of estate which is thus required, is privity of the estate with the original covenantee, not with the original covenantor; and this is the only privity of which there is anything said in the

ancient books. See further, Y. B., 21 & 22 Ed. I. 148 (Roll's ed.); 14 Hen. IV., pl. 5. Of course we are not now speaking of cases of landlord and tenant, and it will be seen that the doctrine has no necessary connection with tenure. F. N. B. 134 E. We may add that the burden of an ordinary warranty in fee did not fall upon assigns, although it might upon an heir as representing the person of his ancestor. Y. B., 32 & 33 Edw. I. 516 (Roll's ed.).

On the other hand, if the rights in question were of the class to which commons belonged, and of which easements are the most conspicuous type, these rights, whether created by prescription, grant, or covenant, when once acquired were attached to the land, and went with it, irrespective of privity, into all hands, even those of a disseisor. "So a disseisor, abator, intruder, or the lord by escheat, &c., shall have them as things annexed to the land. *Chudleigh's Case*, *ubi supra*. (See 1 Britton [Nichols' ed.] 361; Keilway, 145, 146, pl. 15; F. N. B. 180 n.; *Sir H. Nevil's Case*, Plowden 377, 381.) In like manner, when, as was usual, although not invariable, the duty was regarded as falling upon land, the burden of the covenant, or grant, went with the servient land into all hands, and of course there was no need to mention assigns. See cases *supra et infra*. The phrase consecrated to cases where privity was not necessary was *transit terra cum onere*. (Bract., fol. 382, a. b. Fleta, VI., chap. 23, sect. 17. See Y. B., 20 Ed. I. 360 [Roll's ed.]; Keilway 113 pl. 45.) And it was said that "a covenant which runs and rests with the land lies for or against the assignee at common law, *quia transit terra cum onere*, although the assignee be not named in the covenant." (*Hyde v. Dean of Windsor*, Cro. Eliz. 552; *Ibid.* 457, s. c. 5 Co. Rep. 24 a; Moore 309.)

It is not necessary to consider whether possession of the land alone would have been sufficient to maintain the action of covenant: It is enough for our present purposes that it carried the right of property. Neither is it necessary to consider the difficulties that have sometimes arisen in distinguishing rights of this latter class from pure matters of contract, by reason of their having embraced active duties as well as those purely passive and negative ones which are plainly interests carved out of a servient estate and matters of grant. The most conspicuous example is *Pakenham's Case*, Y. B., 42 Ed. III., pl. 14, when the plaintiff recovered in covenant as terre-tenant, although not heir, upon a covenant or prescriptive duty to sing in the chapel of his manor: *Spencer's*

Case, 5 Co. Rep. 16*a*, 17*b*. Another which has been recognised in this Commonwealth is the *quasi* easement to have fences maintained: *Bronson v. Coffin*, 108 Mass. 175, 185; s. c. 118 Id. 156. Repairs were dealt with on the same footing: they were likened to estovers and other rights of common: 5 Co. Rep. 24 *a. b*; *Hyde v. Dean of Windsor*, *ubi supra*. See F. N. B. 127; *Spencer's Case*, *ubi supra*; *Ewre v. Strickland*, Cro. Car. 240; *Brett v. Cumberland*, 1 Roll. R. 359, 360; and other examples might be given. See Bract. 382, *a. b.*; Fleta, vi., c. 53, § 17; Y. B., 20 Ed. I., 360; Keilway 2 *a*, pl. 2; Y. B., 6 Hen. VII., 14 *b*, pl. 2; Co. Litt. 384 *b*, 385 *a.*; *Cockson v. Cock*, Cro. Jac. 125; *Bush v. Cole*, 12 Mod. 24; s. c. 1 Salk. 196; 1 Shower 388; Carthew 232; *Sale v. Kitchenham*, 10 Mod. 158. The cases are generally landlord and tenant cases, but that fact has nothing to do with the principles laid down.

When it is said, in this class of cases, that there must be a privity of estate between the covenantor and the covenantee, it only means that the covenant must impose such a burden on the land of the covenantor as to be in substance, or to carry with it, a grant of an easement or *quasi*-easement, or must be in aid of such a grant (*Bronson v. Coffin*, *ubi supra*), which is generally true, although, as has been shown, not invariably (*Pakenham's Case*, *ubi supra*), and although not quite reconcilable with all the old cases except by somewhat hypothetical historical explanation. But the expression, privity of estate, in this sense is of modern use, and has been carried over from the cases of warranty where it was used with a wholly different meaning.

In the main, the line between the two classes of cases distinguished by Lord COKE is sufficiently clear; and it is enough to say that the present covenant falls into the second class, if either. Notwithstanding its place among the covenants for title, it purports to create a pure negative restriction on the use of land, and we will take it as intended to do so for the benefit of the land conveyed.

The restriction is in form within the equitable doctrine of notice: *Whitney v. Union Railway Co.*, 11 Gray 359; *Parker v. Nightingale*, 6 Allen 341. See *Tulk v. Moxhay*, 2 Phillips 774; *Haywood v. Brunswick Building Society*, 8 Q. B. D. 403; *London & S. W. Railway Co. v. Gomm*, 20 Ch. Div. 562; *Austerberry v. Oldham*, 29 Id. 750. But as the deed is recorded, it does

not matter whether the plaintiff's case is discussed on this footing or on that of easement.

The question remains, whether, even if we make the further assumption that the covenant was valid as a contract between the parties, it is of a kind which the law permits to be attached to land in such a sense as to restrict the use of one parcel in all hands for the benefit of whoever may hold the other, whatever the principle invoked. For equity will no more enforce every restriction that can be devised, than the common law will recognise as creating an easement, every grant purporting to limit the use of land in favor of other land. The principle of policy applied to affirmative covenants, applies also to negative ones. They must "touch and concern," or "extend to the support of the thing" conveyed: 5 Co. Rep. 16 *a*, Ibid. 24 *b*. They must be "for the benefit of the estate:" *Cockson v. Cock*, Cro. Jac. 125. Or as it is said more broadly, new and unusual incidents cannot be attached to land, by way either of benefit or of burden: *Keppell v. Bailey*, 2 My. & K. 517, 535; *Ackroyd v. Smith*, 10 C. B. 164; *Hill v. Tupper*, 2 H. & C. 121.

The covenant under consideration, as it stands on the report, falls outside the limits of this rule, even in the narrower form. In what way does it extend to the support of the plaintiff's quarry? It does not make the use or occupation of it more convenient. It does not in any way affect the use or occupation; it simply tends indirectly to increase its value, by excluding a competitor from the market for its products. If it be asked, what is the difference in principle between an easement to have land unbuilt upon, such as was recognised in *Brooks v. Reynolds*, 108 Mass. 31; and an easement to have a quarry left unopened, the answer is, that whether a difference of degree or of kind, the distinction is plain between a grant or covenant that looks to direct physical advantage in the occupation of the dominant estate, such as light and air, and one which only concerns it in the indirect way which we have mentioned. The scope of the covenant and the circumstances show that it is not directed to the quiet enjoyment of the dominant land.

Again, this covenant illustrates the further meaning of the rule against unusual incidents. If it is of a nature to be attached to land, as the plaintiff contends, it creates an easement of monopoly—an easement not to be competed with—and in that interest alone a right to prohibit one owner from exercising the usual incidents

of property. It is true that a man could accomplish the same results by buying the whole land, and regulating production. But it does not follow, because you can do a thing in one way, that you can do it in all; and we think that if this covenant were regarded as one which bound all subsequent owners of the land to keep its products out of commerce, there would be much greater difficulty in sustaining its validity than if it be treated as merely personal in its burden. Whether that is its true construction, as well as its only legal operation, and whether, so construed, it is or is not valid, are matters on which we express no opinion.

Bill dismissed.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹

SUPREME COURT OF ERRORS OF CONNECTICUT.²

SUPREME JUDICIAL COURT OF MAINE.³

COURT OF ERRORS AND APPEALS OF MARYLAND.⁴

SUPREME COURT OF OHIO.⁵

ACTION.

Suit by Prospective Heirs.—The principle is, both at law and in equity, that no one is entitled to be recognised as heir until the death of the ancestor or person from whom the descent may be cast; and the fact that such ancestor or other person may be alleged and admitted to be *non compos mentis*, or otherwise incapable of managing his estate, makes no exception to the general principle: *Sellman v. Sellman*, 63 Md.

The children of a grantor cannot maintain a bill in their own names, as parties complaining, against the grantor himself and his grantee, for the purpose of impeaching and having set aside a conveyance, upon the ground of fraud and undue influence, and because such conveyance would operate to defeat their future inheritance: *Id.*

AGENT. See *Criminal Law*.

ASSIGNMENT. See *Contract*.

¹ Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term, 1885. The cases will probably appear in 115 U. S. Rep.

² From John Hooker, Esq., Reporter; to appear in 52 Conn. Rep.

³ From J. W. Spaulding, Esq., Reporter; to appear in 77 Me. Rep.

⁴ From J. Shaaff Stockett, Esq., Reporter; to appear in 63 Md. Rep.

⁵ From George B. Okey, Esq., Reporter; to appear in 43 Ohio St. Rep.

ATTACHMENT.

Foreign Attachment—Claim for a Tort.—A claim for a tort is not a "debt," within the meaning of that term as used in the statute with regard to foreign attachment: *Holcomb v. Town of Winchester*, 52 Conn.

And it makes no difference that a suit has been brought for the tort, and that the case stands for a hearing in damages after a default. *Id.*

Stock in Corporation—Prior Pledge—Practice—Dividends.—The interest of a stockholder in the property of a private corporation represented by certificates of shares registered in his name, may be reached by garnishee process served upon the corporation: *Norton v. Norton*, 43 Ohio St.

If the corporation is the attaching creditor, it may by such process served upon itself, reach such interest: *Id.*

Where, prior to the service of such process, the shareholder has pledged the certificates as security for a debt and has delivered them to the pledgee, with an absolute power of sale and transfer upon the books of the corporation endorsed thereon, upon default of payment of the debt hereby secured, the attachment reaches only the surplus after payment of the debt to the pledgee: *Id.*

If, after this interest in the corporation has been thus attached, the pledgee does not exercise the power of sale and transfer vested in him, and the stock remains in the name of the pledgor on the books of the corporation, the court may, proper parties being before it, order the sale of the stock, ascertain such surplus, and order its application to the satisfaction of the judgment in attachment: *Id.*

Such an attachment has precedence over a later one where it is sought to reach this surplus, by garnishee process served upon the pledgee, who has never exercised the power of sale and transfer: *Id.*

Dividends made by the corporation and remaining in its hands after process in attachment has been served, follow the stock, and are subject to the same order of distribution: *Id.*

ATTORNEY.

Confidential Communication—Disclosure of Intent to commit Crime.—It seems to be required by principle that an attorney, learning from the client in a professional consultation, or in any other manner, that the latter proposes to commit a crime, should be holden to owe a higher duty in the matter to society, and to the party to be affected by the crime, than that which he owes to his client. *State v. Barrows*, 52 Conn.

But this exception to the general rule protecting the communications of a client, should be applied only to such statements as afford reasonable evidence of the guilty intent: *Id.*

The rule which protects privileged communications from disclosure is one of public policy and in the interest of justice and its administration, and not one of which only the party making the communication can claim the benefit: *Id.*

BANKRUPTCY.

Sale of Land by Assignee—Injunction not Granted against Subsequent Sale by Order of State Court.—Where a sale of the lands of a bankrupt estate has been made and confirmed by order of the bankruptcy court, and the lands have been conveyed by the assignee, the Circuit Court of the United States is without jurisdiction at the suit of the purchaser to enjoin a sale of the same lands about to be made upon the order of a state court upon judgments in suits commenced by attachment of the lands in question a few days before the defendant was adjudicated a bankrupt: *Sargent v. Helton*, S. C. U. S., Oct. Term 1885.

BILLS AND NOTES. See *Contract*; *Limitation*, *Statute of*.

Days of Grace—Acceptance on Sight Bill without Date, but Specifying Day Bill is Due—Protest.—A bill of exchange, dated March 4th, payable in London sixty days after sight, was accepted by drawee "due twenty-first May," but without date of acceptance: *Held*, that in the absence of affirmative proof that the acceptor in designating the day of payment by the word "due," included the days of grace; protest on May 21st must be considered premature: *Bell v. First National Bank*, S. C. U. S., Oct. Term 1885.

COMMON CARRIER. See *Railroad*.

CONSTITUTIONAL LAW. See *Removal of Causes*.

Proceedings against Inhabitants for Debt of Town.—A statute authorizing executions upon judgments against towns to be issued against and levied upon the goods and chattels of the inhabitants, is constitutional: *Eames v. Savage*, 77 Me.

The process provided in that section is "due process of law," and is not in conflict with the Fourteenth Amendment of the Constitution of the United States: *Id*.

Power to Enact Registration Law.—The general assembly, under the general grant of legislative power secured to it by the constitution, has power to provide by statute for the registration of voters, and to enact that all electors must register before being permitted to vote: *Daggett v. Hudson*, 43 Ohio St.

Such an act, however, to be valid, must be reasonable and impartial, and calculated to facilitate and secure the constitutional right of suffrage, and not to subvert or injuriously, unreasonably or unnecessarily restrain, impair or impede the right: *Id*.

Due Process of Law—Railroad Fence Law—Exemplary Damages—Police Power.—Suit was brought under a Missouri statute requiring railroad companies to fence their tracks and maintain cattle guards, as therein specified, where the road runs through or adjoins cultivated fields or enclosed lands, and providing, in default thereof, that such corporations shall be liable in double the amount of all damages done by its agents, engines or cars to animals on said road, or by reason of any animal escaping from or coming upon said lands and fields, occasioned in either case by failure to maintain such fences or cattle guards; *Held*,

that the statute does not violate sect. 1, of the Fourteenth Amendment to the Constitution of the United States, by depriving the company of property without due process of law in that it allows a recovery of damages for stock killed or injured in excess of its value; nor does it deny it the equal protection of the laws, since each railroad is subjected to the same liability: *Missouri Pac. Railway v. Humes*, S. C. U. S., Oct. Term 1885.

For injuries resulting from neglect of duties, in the discharge of which the public is interested, something beyond compensatory damages may be awarded to the owner by way of punishment for the company's negligence; and the legislature may fix the amount or prescribe the limit within which the jury may exercise their discretion. Authority for imposing such duties as prescribed by the statute in question is found in the police power of a state to provide against accidents to life and property in any business: *Id.*

CONTEMPT.

What Constitutes—Power of Court—Practice.—A defendant in a suit procured a postponement through his counsel on the ground that he was too ill to attend court. The counsel for the plaintiff, suspecting that there had been deception, filed an application, accompanied with affidavits, for an attachment of the defendant for contempt. An order to show cause was issued by the court and served on the defendant. He however did not appear, claiming to be too ill, but his counsel appeared for him and filed an answer, asserting the state of his illness, and disclaiming all intention to disobey the court. To this the plaintiff filed no reply. A hearing was then had in the absence of the defendant, against the protest of his counsel, and the court found him guilty of the contempt charged and sentenced him to pay a fine and costs, the latter taxed as in an ordinary civil suit. *Held*, on the defendant's appeal—1. That the conduct of the defendant, so far as it tended to obstruct and embarrass the court in the administration of justice, was of the nature of a contempt, and that the court below having found it to be a contempt, this court could not, as matter of law, say that it was not so. 2. But that, as the contempt was not committed in the presence of the court, the court could find the defendant guilty of it only on regular proof, making a trial necessary. 3. That as the contempt was a criminal one a civil proceeding for its punishment was irregular; and that the proceeding should have conformed, as nearly as possible, to those in criminal cases. 4. That the court had no power to proceed to trial and judgment in the absence of the defendant, and that he had a right to be heard. 5. That affidavits were improperly admitted as evidence on the trial; also a deposition taken on the part of the plaintiff: *Welch v. Barber*, 52 Conn.

CONTRACT.

Consideration—Delivery.—The treasurer of a savings bank made his note for \$2000, running to the bank, and secured it by an assignment of a life insurance policy on his own life, for the purpose of making up to the bank a loss on loans for which he was neither morally nor legally responsible. After his death the trustees of the bank found the note

and policy, which was the first knowledge they had of the existence of either, and they applied the insurance money first to the payment of the note, and the balance they delivered to the executor of the deceased treasurer: *Held*, 1. That the note was without consideration and void. 2. That the assignment of the policy was void for want of a delivery: *Dexter Sav. Bank v. Copeland*, 77 Me.

Offer to subscribe to Stock—Revocation.—An offer in writing to subscribe to the capital stock of a railroad company, conditioned upon the construction of its line of road along a designated route, is revocable at the option of the party making such offer at any time before its delivery to and acceptance by such company; and his death before such delivery and acceptance works such revocation: *Wallace v. Townsend*, 43 Ohio St.

CORPORATION.

Dividends—Right of Court to compel Declaration of.—As a rule, officers of the corporation are the sole judges of the propriety of declaring dividends. But they are not allowed to act illegally, wantonly or oppressively. And when the right to a dividend is clear, and there are funds from which it can properly be made, a court of equity will compel the company to declare it: *Belfast & Moosehead Lake Rd. Co. v. Belfast*, 77 Me.

Corporation de facto—Rights of—Effect of Judgment of Ouster.—Where an attempt is made, in good faith, to organize a private corporation by colorable proceedings, approved by the Attorney-General and the Secretary of State; the paper intended for the certificate of incorporation admitted to record in the office of the latter, duly certified by him as the certificate of incorporation of such body; where these steps are followed by uninterrupted and unchallenged user for a number of years, and valuable rights and interests have been in good faith acquired, enjoyed and disposed of by such organization, acting as a body corporate, it is a corporation *de facto*, and its corporate capacity cannot be questioned in a private suit to which it is a party: *Society Perun v. City of Cleveland*, 43 Ohio St.

Such an organization has capacity to acquire, hold, enjoy, encumber, and convey the legal title to real estate; and rights acquired or liabilities incurred by it and by parties dealing with it in good faith will not be divested or defeated by a subsequent judgment in *quo warranto* proceedings excluding it from the use of corporate franchises by reason of some defect or omission in the original steps taken to assume corporate powers: *Id.*

A judgment of ouster against a pretended corporation by reason of defect in the form of the certificate of incorporation, is not retroactive in its effect upon rights acquired and liabilities incurred in the course of transactions in good faith with such acting corporation, prior to such ouster: *Id.*

Turnpike Company—Liability for Injury to Traveller—Dangerous Grades.—A turnpike company which derives a revenue from the use of its road by travellers, is directly liable to those who travel upon it for injuries occasioned by the want of repair of the road, without any ex-

press statutory provision imposing such a liability. The liability to pay tolls is a consideration for the undertaking on the part of the corporation to furnish a safe road for the use of the traveller as an equivalent: *President, &c., Baltimore and Yorktown Turnpike Road v. Crowther*, 63 Md.

Where differences in grade exist, the company is bound to make safe and convenient turnouts to the side roads, and where such differences are so great and the slopes to the side roads so precipitous as to be necessarily dangerous, such places should be protected by proper safeguards: *Id.*

COSTS.

Payment out of Fund.—In suits where one person incurs expense in rescuing property for the benefit of many, a court of equity has power to direct that the expenses so incurred shall be paid from the common fund: *Merwin v. Richardson*, 52 Conn.

CONTRIBUTION. See *Costs*.

COURT. See *Contempt*.

CRIMINAL LAW.

Selling Liquor to Minor—Act of Agent.—A licensed dealer in spirituous liquors, indicted for unlawfully selling liquor to a minor, cannot escape the penalty of the offence by proving that the sale was made by his barkeeper, during his absence, without his knowledge and contrary to his instructions given in good faith, and which were so understood by the barkeeper. The intent in such case is immaterial in determining the guilt: *Carroll v. State*, 63 Md.

Where the agent is set to do the very thing which, and which only, the business of the principal contemplates, namely, the dispensing of liquors to purchasers, the principal must be chargeable with the agent's violation of legal restrictions on that business. The act of the agent is the act of the principal: *Id.*

DEBTOR AND CREDITOR. See *Equity*.

EQUITY. See *Corporation*; *Lis Pendens*.

Creditors' Bill—Parties Defendants—Multifariousness.—Where a debtor conveys all his property in distinct parcels to separate parties and dies, a creditors' bill to set aside said conveyances for fraud, may join all the grantees in the several deeds as defendants, in order to bring all the property within reach of the creditors' claims: *Brian v. Thomas*, 63 Md.

There is no rule of universal application as to the doctrine of multifariousness, and much must be left to the discretion of the court in particular cases: *Id.*

Bill to Restrain Nuisance—Joinder of Defendants whose Several Acts Contribute to the Nuisance.—Where several respondents, though acting independently of each other, deposit the refuse material and debris

arising from the operation of their mills into the same stream, whence, by the natural current of the water, it is carried down the river and commingles into one indistinguishable mass before reaching the complainant's premises. *Held*, upon a bill in equity for perpetual injunction, that while the acts of the respondents may be independent and several, the result of these several acts combines to produce whatever damage or injury the complainant suffers, and in equity constitutes but one cause of action, and all the respondents may be joined in the same bill to restrain the nuisance: *The Lockwood Co. v. Lawrence* 77 Me.

ERRORS AND APPEALS.

Powers of a Court of Error as to Evidence—Decision as to Right to Closing Argument not Reviewable.—The Supreme Court of the United States cannot review the weight of the evidence, and can look into it only to see whether there was error in not directing a verdict for the plaintiff on the question of variance, or because there was no evidence to sustain the verdict: *Lancaster v. Collins*, S. C. U. S., Oct. Term, 1885.

The question as to which party shall make the closing argument to the jury is one of practice, and is not the subject of a bill of exceptions or of a writ of error: *Id.*

Jurisdiction of the United States Supreme Court—\$5000 Limit—Several Defendants and Separate Judgments.—Where suit is brought against heirs to enforce their liability for the payment of a note on which their ancestor was bound, and they plead neither counter-claim nor set-off, and ask no affirmative relief, and separate judgments are rendered against each for his proportionate share, this court has jurisdiction in error only over those judgments which exceed \$5000: *Henderson v. Wadsworth*, S. C. U. S., Oct. Term, 1885.

EVIDENCE.

Right of Witness to Decline to give Evidence Criminating him—Practice.—The privilege accorded to a witness of declining to make any disclosure that might be used for his crimination, is a personal privilege, and must be claimed by him upon oath, and neither the party to the cause, nor the counsel engaged, will be permitted to make the objection: *Chesapeake Club v. State*, 63 Md.

The mere statement of the witness on oath that he believes that the answer to the question asked will tend to criminate him, will not suffice to protect him from answering, if from all the circumstances surrounding the case the court be satisfied that the answer will have no such effect as that claimed by the witness. It is for the court to decide whether the privilege is well and *bona fide* claimed or not: *Id.*

After a witness has been sworn he may claim his protection at any stage of the inquiry, and upon his so doing he cannot be compelled to answer any additional question that would tend to criminate him: *Id.*

Witness—Refreshing Recollection by Memoranda.—A witness may

refer to memoranda made by himself or others for the purpose of refreshing his recollection : *Erie Preserving Co. v. Miller*, 52 Conn.

And it is of no consequence whether the memoranda thus referred to are originals or copies ; they are solely for the use of the witness and are not evidence to go to the jury : *Id.*

What necessary to Warrant Verdict in Civil Case.—In civil cases the verdict of the jury should be determined by the mere preponderance of evidence, even though the conclusion imputes to the defendant the guilt of a felony : *Mead v. Husted*, 52 Conn.

In a civil suit for the burning of the plaintiff's barns the judge instructed the jury that if, after giving the defendant the benefit of the presumption in his favor, they fairly and honestly believed that it was more likely to be true that the defendant set fire to the plaintiff's barns than that he did not, they ought to render a verdict for the plaintiff, and if they did not so believe, then for the defendant : *Held*, on the defendant's appeal, to be no error : *Id.*

EXECUTORS AND ADMINISTRATORS.

When Purchaser at Invalid Sale of Real Estate made by Administrator by Order of Probate Court, not Protected.—The Mississippi Code of 1871, sect. 2173, by which any action to recover property because of the invalidity of an administrator's sale by order of a probate court must be brought within one year, "if such sale shall have been made in good faith, and the purchase-money paid," does not apply to an action brought by the heir to recover land bid off by a creditor at such a sale for the payment of his debt, and conveyed to him by the administrator, and not otherwise paid for than by giving the administrator a receipt for the amount of the bid. The invalidity of the sale in this case was owing to the administrator never having given bond to account for the proceeds of the sale as required by statute : *Clay v. Field*, S. C. U. S. Oct. Term 1885.

GIFT.

Donatio causa mortis—What Constitutes.—G. was a man of advanced age, having a wife, and daughters by a first wife, and, by the present wife a son, with whom he boarded ; his property consisted partly of a farm and stock thereon, but mostly of promissory notes of various amounts ; before his last sickness he had expressed a desire "that his children should have his notes and his son should have his farm ;" on the morning of the day of his death, and in the presence of a daughter's husband, herself and a sister, G. called the daughter and said to her, "my notes are in a little box on the bureau there, I want you to take them and divide them equally among you children ;" he told her to get the key to the box, and she got the key and tried it in the box, and gave the key to her husband for safe keeping. After his death intestate, she took the box and did not divide the notes, but returned them to the administrator, and they were appraised and held as part of the estate. In an action by the daughters, claiming for themselves and the son, the notes and their proceeds as against the administrator and the

widow: *Held*, 1st. These facts do not show such a delivery as constitutes a valid gift *causa mortis*. 2d. These notes and their proceeds are assets of the estate, and the widow is entitled to her proper part thereof: *Gano v. Fisk*, 43 Ohio St.

HIGHWAY. See *Corporation*.

HUSBAND AND WIFE.

Burial Expenses of Wife—By whom Payable.—It is the duty of a husband to defray the expense of burying, in a suitable manner, his deceased wife, and he has no right to charge it against her estate: *Staple's Appeal from Probate*, 52 Conn.

Receipt of Wife's Money by Husband—When Wife is a Creditor.—A wife may become a creditor of her husband, in respect of money or property belonging to her as her separate estate, which the husband has received under an express promise at the time to repay her. But if such money or other separate property has been received by the husband with the knowledge and acquiescence of the wife, without such express promise at the time, no implied assumpsit, either legal or equitable, will arise to support a claim against the husband or his estate: *Grover & Baker Sewing Machine Co. v. Radcliff*, 63 Md.

Divorce—Alimony—Subsequent Re-marriage—Reduction.—Where alimony had been granted, in instalments, to a divorced wife, and she is afterwards re-married to a man financially able to, and who does, in fact, support her, these facts would *prima facie* be a good cause for modifying the former decree so as to reduce the amount to be paid for her support to a nominal sum, or such sum, as in the changed condition of the defendant, the court might deem just and reasonable: *Olney v. Watts*, 43 Ohio St.

INJUNCTION. See *Equity*; *Railroad*.

INTEREST. See *Mortgage*.

INTOXICATING LIQUOR. See *Criminal Law*.

LIMITATIONS, STATUTE OF.

Endorsement of Payment on Note.—An endorsement of the payment of money on a note, made by the holder after it has become barred by the statute of limitations, is to be regarded as an entry made in his interest: *Coon's Appeal from Commissioners*, 52 Conn.

Where in such a case it had been found in the court below that there was no evidence that the money so endorsed was in fact paid by the maker or with his knowledge, it was *held* that this court could not, as matter either of fact or of law, infer such payment from the endorsement: *Id.*

LIS PENDENS.

What constitutes.—That to constitute a *lis pendens* to bind a purchaser, a bill must not only be actually filed, having special reference to spe-

cific property, but the subpoena must also have been served upon the defendant, before the *lis pendens* will begin: *Sanders v. McDonald*, 63 Md.

MORTGAGE.

Mortgagor—Presumption of Payment—Statute of Limitations.—The presumption of payment in favor of a mortgagor in possession over twenty years, is not conclusive, but may be rebutted by evidence of part payment of principal or interest, or by admissions of the existence of the debt, or other circumstances from which it may be inferred the debt has not been paid. In other words, a recognition of the mortgage debt involving a promise to pay it, will remove the bar of the Statute of Limitations: *Brown v. Hardcastle*, 63 Md.

Where a bond is given conditioned for the payment of a sum named, with one per cent. interest thereon by a particular day, and there is no stipulation in relation to interest after that day, in case the debtor should fail to pay the debt, the creditor is entitled to the legal rate of interest after that time: *Id.*

Trust Deed to two Trustees—Absence of one of them at the Sale.—Under a deed of trust covering land in the District of Columbia, made by a debtor to two grantees, their heirs and assigns, to secure the payment of a promissory note, by which deed the grantees were empowered, on default, to sell the land at public auction, "on such terms and conditions, and at such time and place, and after such previous public advertisement," as they "their assigns or heirs," should deem advantageous and proper, and to convey the same in fee simple to the purchaser, a sale was had by public auction, under a notice of sale, signed by both of the trustees, and duly published in a newspaper; but at the sale only one of the trustees was present. The proceedings at the sale were fair: both of the trustees united in a deed to the purchaser, and no ground appeared for setting the sale aside: *Held*, that the absence from the sale of one of the trustees was not a sufficient reason, of itself, for setting aside the sale, as against the former owner of the land: *Smith v. Black*, S. C. U. S., Oct. Term 1885.

NEGLIGENCE. See *Corporation*.

MUNICIPAL CORPORATION. See *Officer*.

NONSUIT.

Right of Plaintiff to Suffer.—After the evidence was closed upon both sides the plaintiff stated that he voluntarily became nonsuit, and the court ruled as a matter of law that he could not become nonsuit against the defendant's objection. *Held*, error: *Washburn v. Allen*, 77 Me.

Before opening his case the plaintiff may become nonsuit as a matter of right. After the case is opened, and before verdict, he may have leave to become nonsuit in the discretion of the court; after verdict there can be no nonsuit: *Id.*

NUISANCE. See *Equity*.

OFFICER.

Removal—Pre-requisites.—Where an officer is "subject after hearing to removal by the mayor, by and with the advice and consent of the aldermen," the hearing must be by the "board of mayor and aldermen." A hearing by the aldermen alone is not sufficient, even if by the officer's consent: *Andrews v. King*, 77 Me.

Where an officer is removable in the manner above stated for "inefficiency or other cause," the mayor and aldermen must find sufficient cause to exist as matter of fact, and so adjudicate, before a valid order of removal can be made. An omission to pass upon the truth of the charges invalidates the order of removal: *Id.*

PRACTICE. See *Nonsuit*.

RAILROAD.

Discrimination in Freights—Injunction.—Discrimination in rates by a railroad company cannot be upheld simply because the favored shipper may furnish for shipment during the year a larger freightage in the aggregate than any other shipper, or more than all others combined. A discrimination resting exclusively on such a basis will not be sustained: *Schofield v. Lake Shore & M. S. Railroad*, 43 Ohio St.

Where it appeared that the plaintiffs' business was such as to make them frequent shippers, and that a continuous series of shipments was necessary in conducting their business, and that a remedy sought by actions at law would lead to a multiplicity of suits: *Held*, the court will intervene by injunction to prevent a multiplicity of suits, and it is not a pre-requisite that the plaintiffs should have first established their rights by an action at law: *Id.*

Where a defendant railroad company is a corporation, consolidated under the statutes of several states, including this state, and its road extends into several states: *Held*, that its acts of injurious discrimination committed or threatened in this state, to the business of shippers, either here or along the line of its railroad in this state, may be enjoined by the courts of this state: *Id.*

REMOVAL OF CAUSES.

Case arising under the Constitution or Laws of the United States.—If from the questions involved in a case, it appears that some title, right, privilege or immunity on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States, within the meaning of that term as used in the Act of March 3d 1875, otherwise not: *Starin v. New York*, S. C. U. S., Oct Term 1885.

SALE.

Conditional Sale—Title.—An innkeeper sent the following order to a wholesale liquor dealer: "Please send by first express a half barrel Bourbon whiskey and two baskets of Piper wine. What is used I will

account for and ship rest back to you. I want it for the commercial travellers, who will be here Friday to dinner:" *Held*, that the title passed on delivery to the innkeeper, so that the liquors could be attached by his creditors as his property: *Hotchkiss v. Higgins*, 52 Conn.

Contract of—Place of Shipment a Material Incident—Repudiation of Contract.—In a mercantile contract a statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, or condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract: *Filley v. Pope*, S. C. U. S., Oct. Term 1885.

Under a contract for the sale of "500 tons No. 1 Shotts (Scotch) pig iron, at \$26 per ton cash, in bond at New Orleans; shipment from Glasgow as soon as possible; delivery and sale subject to ocean risks,"—shipment from Glasgow is a material part of the contract, and the buyer may refuse to accept such iron shipped as soon as possible from Leith, and arriving at New Orleans earlier than it would have arrived by the first ship that could have been obtained from Glasgow: *Id.*

SHIPPING.

Contract between Part Owners as to Sailing.—Whether a contract entered into between two of several part owners of a vessel, wherein they mutually stipulate that each shall sail the vessel as master alternate years, is void as against public policy—*quere*: *Rogers v. Sheerer*, 77 Me.

Assuming such a contract to be valid, the true construction of it is, that each shall sail the vessel alternate years, only so long as he performs the high and responsible duties of master with that degree of care, attention, prudence and fidelity which the law demands; and when he fails to do that, he can no longer invoke the aid of the contract against the other: *Id.*

Earnings—Action by Part Owner against Master.—An action for money had and received cannot be maintained by a part owner (not the ship's husband), for his share of the freight money, against the master, who collected and remitted the same to the ship's husband after receiving a written notice from such part owner to remit his share to him: *Patten v. Percy*, 77 Me.

WITNESS. See *Evidence*.

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LEGISLATION IMPAIRING THE OBLIGATION OF CONTRACTS.

THE tenth section of the first article of the Constitution of the United States prohibits the several states from passing any law impairing the obligation of contracts. Like most of the clauses of that instrument this limitation has had a cogent influence in the decision of a long array of reported cases, and its operation has been found to determine the validity of many different species of legislation. It is the purpose of this article to examine in detail the more important applications of the prohibition, in the light of the authorities where its effect has been called in question and decided.

I. *Charters of Private Corporations.*—Since the decision in the great case of *Dartmouth College v. Woodward*, 4 Wheat. 518, it has scarcely ever been doubted that a charter of a private corporation is a contract, within the meaning of the constitutional limitation, between the state and the corporators, and that any act of legislation which impairs it, whether by enlarging the power of the state over the body corporate, or by abridging its franchises, or otherwise altering it in a material point, is invalid. The case cited held that the charter granted by George III., to the trustees of Dartmouth College in 1769 was a contract, and not subject to alteration at the hands of the New Hampshire legislature. And the same principle was upheld in the equally celebrated case

of *Fletcher v. Peck*, 6 Cranch 87. And see *Commercial Bank v. State*, 6 Sm. & M. 599; *Attorney-General v. Bank of Charlotte*, 4 Jones Eq. 287; per contra, *State v. Railroad*, 24 Texas 80; *Toledo Bank v. Bond*, 1 Ohio St. 622. As examples of legislative interference with corporate rights may be cited *Pingry v. Washburn*, 1 Aik. 264, where a statute authorizing certain persons to pass over a turnpike road without paying toll, who were not exempt by the act incorporating the turnpike company, was held unconstitutional; and the case of *Commonwealth v. New Bedford Bridge*, 2 Gray 339, where the charter of a bridge company authorized the erection of a bridge "with two suitable draws which shall be at least thirty feet wide," and it was held that a subsequent act requiring such draws to be of the width of sixty feet was invalid, as annexing new conditions. But a grant of a corporate franchise, like any other contract, must be accepted by the grantee, in order to raise any obligation. Hence a law declaring the repeal of all charters under which a *bona fide* organization has not taken place and business been entered upon within the time limited by the charter, or, if none be specified, within a reasonable time, is not in conflict with the constitution: *Chincleclamouche Lumber Co. v. Commonwealth*, 100 Penn. St. 438; *Gregory v. Shelby College*, 2 Met. (Ky.) 589; *Balto. & Susq. Rd. Co. v. Nesbit*, 10 How. 395. It is axiomatic that every contract must be founded upon a consideration, and the consideration in the case of a private charter is of course understood to be the advantage which the public expects to derive from it, whether of convenient transportation of persons and property, or increased facilities in the circulation of money, or reduced cost of manufactured articles, or what not. And even in the case of a mere grant by the legislature, based on no consideration at all, if the grant has become completely executed it is thereafter, like a gift between individuals, irrevocable: *Derby Turnpike Co. v. Parks*, 10 Conn. 522. Equally within the prohibition are the rights and powers incidental to the corporation and proper and necessary to carry into effect the authorities granted by its charter: *Planters' Bank v. Sharp*, 6 How. 301. At the same time, this constitutional immunity cannot be carried so far as to exempt the corporation from the proper and reasonable control of the state in cases where its privileges have been perverted or abused or the rights of third persons are in danger of being compromised through its actions. This position is very vigorously maintained by Mr.

Justice HARLAN, in a case decided by the United States Supreme Court in March 1885 (*Chicago Life Insurance Co. v. Needles*, 111 U. S. 574). The learned judge says: "The right of the plaintiff in error to exist as a corporation and its authority in that capacity to conduct the particular business for which it was created, were granted subject to the condition that the privileges and franchises conferred upon it should not be abused, or so employed as to defeat the ends for which it was established, and that, when so abused or misemployed, they may be withdrawn or reclaimed by the state in such way and by such modes of procedure as are consistent with law. Although no such condition is expressed in the company's charter, it is necessarily implied in every grant of corporate existence:" *Bank of the Republic v. Hamilton*, 21 Ill. 53; *Mobile, &c., Rd. v. State*, 29 Ala. 573; *Louisville, &c., Co. v. Ballard*, 2 Met. (Ky.) 165. So a law which gives a workman, employed by a sub-contractor on a railroad, the right to recover against the corporation, applies to existing companies and is not unconstitutional: *Grannahan v. Railroad*, 30 Mo. 546.

Whenever a right to repeal, alter, or amend a charter is reserved to the state in the act of incorporation itself, its exercise will not impair the obligation of the contract: *Commonwealth v. Fayette Co. Rd.*, 55 Penn. St. 452; *Miners' Bank v. U. S.*, 1 Greene (Iowa) 553; *Perrin v. Oliver*, 1 Minn. 202; *In re Oliver Lee & Co.'s Bank*, 21 N. Y. 9. And where several charters are contained in one act, it is enough if the power of repeal be reserved in any part of the same act, provided the language of the clause is sufficient to embrace the whole act: *Ferguson v. Bank*, 3 Sneed 609. Or the power of revocation may be reserved in the state constitution, and, in that event, need not be repeated in the charter: *Delaware Rd. Co. v. Tharp*, 5 Harr. (Del.) 454. Of course the legislature is not prohibited from altering a charter, even in its most essential features, if the changes are accepted and agreed to by the corporation: *Ehrenzeller v. Union Canal Co.*, 1 Rawle 190; and the assent of a corporation to legislative changes in its charter may be inferred from such circumstances as would raise a similar presumption in the case of a natural person: *Commonwealth v. Cullen*, 13 Penn. St. 133.

II. *Municipal Corporations*.—The foregoing remarks are to be applied solely to such corporations as are essentially private in their nature. With regard to municipal bodies the rule is different.

Their charters are not contracts; and they are not exempt, by the constitution, from the control of the legislature, except in so far as private property rights are involved. In the language of the Pennsylvania court: "There can be no doubt that the legislature possesses the power to alter the charters of such public bodies as concern the welfare and wholesomeness of the body politic; such as concern the administration of government, and are emphatically public. Such are the corporations of cities and boroughs, when no private right of property is involved, except incidentally, and such as can be easily reserved and compensated:" *Brown v. Hummel*, 6 Penn. St. 86; *Terrett v. Taylor*, 9 Cranch 52; *Bruffett v. Railroad*, 25 Ill. 353; *Layton v. New Orleans*, 12 La. Ann. 515. The distinction is thus stated by a learned judge in Maine; "The distinction between public and private corporations has reference to their powers and the purposes of their creation. They are public, when created for public purposes only, connected with the administration of the government, and where the 'whole interests and franchises are the exclusive property and domain of the government itself.' * * * All corporations invested with subordinate powers, for public purposes, fall within this class, and are subject to legislative control:" *Yarmouth v. North Yarmouth*, 34 Me. 417. But it was held, in the same case, that where the charter of a town grants to its trustees a fund for the use of its schools, the trustees constitute, for that purpose, a *private* corporation, and a subsequent statute, appropriating a part of that fund to the uses of another town, is therefore unconstitutional. And indeed it is well settled that when the state enters into an actual contract with a municipal corporation, the subordinate relation ceases and gives place to the equality subsisting between all contracting parties: *Grogan v. San Francisco*, 18 Cal. 590.

III. *Grants of Exclusive Privileges.*—Notwithstanding some difference of opinion it may now be regarded as established law that it is within the power of the legislature to grant to a corporation exclusive rights and privileges which no future legislature can revoke or impair. The principal case on this point is that of *The Binghamton Bridge*, 3 Wall. 51, where it was held that a charter to a bridge company to erect a bridge and take tolls, enacting that thereafter it shall not be lawful for any person or persons to erect any other bridge across the same stream within a distance of two miles above or below the proposed bridge, constitutes a contract

between the state and the corporation which is inviolable within the constitutional prohibition ; and that it means not only that no person shall erect such bridge without legislative authority, but that the legislature will not *make it lawful* for any person to do so. And see same point in *Bridge Co. v. Hoboken Land, &c., Co.*, 2 Beasley (N. J.) 81 ; *Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 35 ; *Collins v. Sherman*, 31 Miss. 679 ; *Trustees v. Aberdeen*, 13 Sm. & Mar. 645. But if the privileges granted to the corporation are not made exclusive by the clear and unmistakable language of the act, the obligation of the contract is not considered as impaired by a subsequent grant, by the legislature, of a similar franchise to another corporation, notwithstanding the use of the latter may damage or even destroy the value of the first franchise or rival and diminish its profits : *Charles River Bridge v. Warren Bridge*, 11 Pet. 420 ; *Turnpike Co. v. State*, 3 Wall. 210 ; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44 ; *Matter of Hamilton Ave.*, 14 Barb. 405. In other words, in a simple act of incorporation, not conferring exclusive privileges, the legislature does not contract to preserve the *value* of the franchise, but only that the franchise itself shall not be taken away or materially altered. The rule of construction in such cases is, that the charter is to be construed strictly against the grantee, and nothing is to be taken by implication ; and therefore the state will not be held to have fettered its hands, in regard to granting rival franchises, unless such limitation is expressed in the grant itself in plain and explicit terms : *Charles River Bridge v. Warren Bridge*, *supra* ; *Hartford Bridge Co. v. Union Ferry Co.*, 29 Conn. 210 ; 2 Washburn on Real Property, 296.

IV. *Exemption from Taxation*.—It is also within the power of the legislature to exempt the property of a corporation from all future taxation, or from all assessment beyond a certain amount, and such an engagement, if express and positive, constitutes an irrevocable and inviolable contract under the federal constitution. The leading case on the subject is that of *The State of New Jersey v. Wilson*, 7 Cranch 164. It appeared that in 1758 the legislature of New Jersey passed an act to give effect to an agreement made by certain commissioners with the Delaware Indians, which agreement included the relinquishment by the Indians of their claim to all lands within the colony, in consideration of the purchase for them of a tract of land on which they might reside, and the act

provided that such tract so purchased should not thereafter be subject to any tax. In 1801 the Indians sold the tract, with the consent of the legislature, and removed from the state. In 1804 the legislature repealed that section of the act of 1758 which exempted the lands from taxation, assessed the lands, and demanded the tax from the purchasers; whereupon this controversy arose. The Supreme Court held that the proceedings between the colony and the Indians constituted a contract, of which the exempting clause was an integral part, and that therefore the repeal of that clause violated the obligation of the contract, and was unconstitutional. And see *Gordon v. Appeal Tax Court*, 3 How. 133; *State Bank of Ohio v. Knoop*, 16 Id. 369; *Hardy v. Waltham*, 7 Pick. 110; *People v. Roper*, 35 N. Y. 633. Though this doctrine is generally agreed to, another line of cases introduces a limitation upon it, viz.: that there must be a special consideration for the grant of an extraordinary privilege, like that of exemption from taxation; that if no bonus is paid by the corporation, no right surrendered to the public, no service or duty or additional obligation imposed upon the corporators as a consideration for it, it is a mere spontaneous concession on the part of the legislature, and not properly a part of the contract: *Washington University v. Rowse*, 42 Mo. 308; *People v. Comm'rs of Taxes*, 47 N. Y. 501; *Hospital v. Philadelphia County*, 24 Penn. St. 229. Thus it is said in a New York case: "It is never to be assumed, however, that the state has, even to this extent, fettered its power in the future, except upon clear and irresistible evidence that the engagement was in the nature of a private contract, as distinguished from a mere act of general legislation, and that such, in the particular instance, was the actual and deliberate intention of the state authorities:" *People v. Roper*, 35 N. Y. 633. And where the act of incorporation prescribes that no other liabilities or obligations shall be imposed on the corporation than those contained in its charter, still the legislature does not divest itself of the right to make further enactments as to the mode, the time when, and the courts where, those liabilities and obligations shall be enforced: *Gowen v. Railroad*, 44 Me. 140.

V. *Eminent Domain*.—These questions concerning grants to corporations are often complicated with the peculiar rights of the state, growing out of the power of eminent domain. Whether the legislature *can*, in any particular instance, by contract, divest the people of the right of eminent domain, is a question propounded

but not decided in the case of *Brewster v. Hough*, 10 N. H. 138; but the court intimates a very strong opinion that this "power is inherent in the people, under a republican government, and so far inalienable that no legislature can make a contract by which it shall be surrendered without express authority for that purpose in the constitution, or in some other way directly from the people themselves." But this case, even if it were a positive authority for the position there indicated, is in direct conflict with the preponderance of judicial opinion. The authorities cited in the preceding section conclusively establish that the right of taxation, at least, may be waived by the legislature, provided the intention to do so is manifested in unequivocal terms; and it is apprehended that, under the coercive force of those rulings, the doctrine would be extended to any similar questions which might arise. But here, also, the grant is to be strictly construed against the corporators, and in favor of the public, and "nothing passes but what has been granted in clear and explicit terms, and neither the right of taxation, nor any other power of sovereignty, will be held by this court to have been surrendered, unless such surrender has been expressed in terms too plain to be mistaken:" *Jefferson Bank v. Skelly*, 1 Black (U. S.) 436. And it is important to be noted that the power of eminent domain, so far as concerns the right to take private property for public uses, is never waived. The very franchise itself is only a species of property (and not more sacred than any other kind), and hence may be taken or destroyed by the state in the exercise of its sovereign powers, as well as any other property of the citizen; and when compensation is provided for its infringement, its obligation is not impaired, but recognised: *In re Twenty-Second Street*, 102 Penn. St. 108; *Backus v. Lebanon*, 11 N. H. 19; *Central Bridge v. Lowell*, 4 Gray 474; *Piscataqua Bridge v. N. H. Bridge*, 7 N. H. 35.

VI. *Contracts of the State with Individuals.*—Passing from corporations and their privileges to natural persons, there can be no doubt that states may contract with individual citizens, and that such engagements, if authorized by law, are equally protected under the ægis of the constitution, so that rights acquired under them cannot be arbitrarily withdrawn or divested by subsequent legislation: *Woodruff v. State*, 3 Pike 285. Thus a contract by the state to convey lands on the performance of a condition precedent by the grantee, creates an obligation to parties accepting and partly per-

forming the condition which the legislature cannot evade by a repeal of the granting act: *Montgomery v. Kasson*, 16 Cal. 189; *Stanmire v. Taylor*, 3 Jones (N. C.) 207. So also, a statute providing for the funding of the floating debt of a city, amounts to a trust agreement, upon valuable consideration, and is therefore substantially beyond the control of the legislature: *People v. Bond*, 10 Cal. 563. So where a state chartered a bank, of which it was to be the sole stockholder, and provided that the bills of such bank should be receivable in payment of all debts due the state, it was held (though by a divided court), that this constituted a contract with the holders of such bills to receive the same in payment of state dues, and that consequently that clause could not be repealed as to existing holders: *Woodruff v. Trapnall*, 10 How. 190. And in a recent and highly important series of cases, ("The Virginia Coupon Cases"), it has been held by the supreme federal tribunal that when the State of Virginia, in funding the public debt in 1871, agreed that the coupons attached to the new bonds should be receivable in payment of all debts, taxes, and other demands due the state, this raised a contract between the state and the coupon-holders, the obligation of which could not be impaired by subsequent legislation declaring that such coupons should not be taken in payment of state taxes: *Hartman v. Greenhow*, 102 U. S. 672; *Antoni v. Greenhow*, 107 Id. 769; *Poindexter v. Greenhow*, 9 Va. Law Journal 331. But in respect to executory contracts, the state stands upon the same footing as an individual. That is, while the grant or contract remains unexecuted, while it still requires some further act to its completion, and while no consideration in fact or presumed exists, it may be revoked or repudiated in the same way that a mere naked promise between individuals may be recalled: *Trustees v. Rider*, 13 Conn. 87. And further, in the language of ANDREWS, J.: "The state may at any time abandon an enterprise which it has undertaken, and refuse to allow the contractor to proceed, * * * or enter into a new contract for its performance by other persons, without reference to the contract previously made, and although there has been no default on the part of the contractor. The state, in the case supposed, would violate the contract, but the obligation of the contract would not be impaired by the refusal of the state to perform it. The original party would have a just claim against the state for any damage sustained by him from the breach of the contract: *Lord v. Thomas*, 64 N. Y. 107. Finally, a law giving permission

to bring suits against the state is not a contract: *Beers v. Arkansas*, 20 How. 527.

VII. *Tenure of Public Office and Compensation*.—The constitutional limitation does not apply to the appointment or continuance in office, nor to the compensation, of the public officers of the state or municipality, unless provided for in the constitution of the state. Such engagements are not considered as contracts. Their compensation may be increased or diminished, or their terms of office closed, at the will of the legislature, subject only to the state constitution: *Butler v. Pennsylvania*, 10 How. 402; *Benford v. Gibson*, 15 Ala. 521; *State v. Smedes*, 26 Miss. 47; *Commonwealth v. Bacon*, 6 S. & R. 322; *People v. Devlin*, 33 N. Y. 273; *Barker v. Pittsburgh*, 4 Penn. St. 49. Thus it is said, in *Barker v. Pittsburgh*, “that there is no contract, express or implied, for the permanence of a salary, is shown by the constitutional provision for the permanence of the salaries of the governor and judges as exceptions.” And even where an office is created by the constitution and defined as to the term and salary, still the people may, by the adoption of a new constitution, terminate both without regard to the interests or expectations of the incumbent: *Conner v. New York*, 2 Sandf. 355; *Coffin v. State*, 7 Ind. 157.

VIII. *Contracts between Individuals*.—The first and most obvious application of the clause we are considering is to contracts between private individuals; yet not many cases have arisen on this point, and those must be reviewed rather as examples of the general principle than as establishing broad rules of application. Thus, a law changing the rate of interest on existing debts, though not falling due till after its date, impairs the obligation of contracts and is unconstitutional: *Myrick v. Battle*, 5 Fla. 345; *Brewer v. Otoe*, 1 Nebr. 373; *Roberts v. Cocke*, 28 Gratt. 207. So where a law makes the stock of stockholders in a corporation liable for its debts, it cannot be repealed as to existing debts, for that would impair the contract of the creditors with the bank: *Hawthorne v. Calef*, 2 Wall. 10; but on the other hand, there being no privity of contract between creditors of corporations and the individual stockholders, the latter are *personally* liable (if at all) only by express statutory provisions, not by contract, and hence the repeal of a law declaring their individual liability does not impair the obligation of any contract: *Coffin v. Rich*, 45 Me. 507. So an enactment that indorsers in blank of promissory notes before

delivery, &c., shall be entitled to notice of non-payment the same as regular indorsers, cannot apply to existing notes, for it would materially alter the contract relations of the parties: *Cook v. Goo-gins*, 126 Mass. 410. But a law prohibiting the future making of contracts of a specified kind is not within the purview of the limitation: *Churchman v. Martin*, 54 Ind. 380; nor is a law which makes valid a void contract: *Welch v. Wadsworth*, 30 Conn. 150. Nor was the constitutional prohibition intended to interfere with the legislation of the states in regard to their internal police. Hence a law declaring a certain day to be a legal holiday cannot be regarded as impairing the obligation of the contract contained in a promissory note, already existing, although its effect is to make such note payable one day earlier than it would otherwise have been: *Barlow v. Gregory*, 31 Conn. 261. Nor can a law which is in force at the time a contract is made be deemed to have this effect; for the parties are legally consensant of it, the contract is made with reference to it, and it is embodied in their agreement: *Blanchard v. Russell*, 13 Mass. 16. Neither can the limitation be extended to judicial decisions which declare a contract void because it contravenes the constitution: *McClure v. Owen*, 26 Iowa 243. Finally, it is competent only for the party whose rights are invaded to plead the nullity of a law as impairing the obligation of contracts: *New Orleans Navigation Co. v. New Orleans*, 12 La. An. 364.

IX. *State Insolvent Laws*.—It is settled that a state insolvent law, allowing the absolution of the debtor, is not unconstitutional as impairing the obligation of contracts, provided that it is not extended to pre-existing debts, but only to such as were contracted after the law went into effect, and provided that it shall only apply to citizens of the state and to such others as voluntarily place themselves within its control and jurisdiction for that particular purpose: *Sturges v. Crowninshield*, 4 Wheat. 122; *Baldwin v. Hale*, 1 Wall. 223; 1 Kent's Com. *422. And whereas this principle was at one time made to rest upon the ground that parties contracted with reference to existing insolvent laws and so made them a part of their contract, that theory seems to be rejected by the more recent cases, and an entirely different basis established. In the language of Judge GARDINER: "The permission by these laws accorded to a debtor to absolve himself is an act of sovereignty, induced by considerations of public expediency. It is the exercise of a power not derived from or dependent upon contract, but beyond

and in hostility to it. The public good or the exigencies of a state may require the taking of private property without the consent of the owner, or the discharge of a debt without the consent of the creditor; but the idea that the justification in either case rests on contract or depends upon the assent of the holder, has scarcely the merit of plausibility :'' *Donnelly v. Corbett*, 3 Seld. 505.

Nothing can be more firmly established, however, than that a discharge of the debtor under the insolvent laws of his own state has no effect whatever upon contracts made with citizens of other states, or upon contracts not made within the state : *Ogden v. Saunders*, 12 Wheat. 213 ; *Baldwin v. Hale*, 1 Wall. 223 ; *Felch v. Bugbee*, 48 Me. 9 ; *Guernsey v. Wood*, 130 Mass. 503 ; *Whitney v. Whiting*, 35 N. H. 467 ; *Pratt v. Chase*, 44 N. Y. 597 ; Story on Conf. Laws, § 341. And in *Guernsey v. Wood*, *supra*, this principle was held to apply though the contract was made and to be performed in the state of the defendant, and even though made by the defendant with plaintiff's agent who was also a resident of that state and whom defendant supposed to be the principal, the fact of agency not being disclosed. These decisions proceed upon two well known and analogous rules of law ; (1) that state laws have no extra-territorial force, (2) that the courts of a state have, generally, no jurisdiction over non-residents. It is therefore entirely in accordance with this principle to hold that foreign creditors may put themselves on a footing with citizens, and be equally bound by the debtor's discharge, by becoming parties to the proceedings, by proving their debts under the commission of insolvency, by accepting dividends, or by any other act which clearly shows their submission to the jurisdiction : *Whitney v. Whiting*, 35 N. H. 467 ; *Pratt v. Chase*, 44 N. Y. 597. But if the contract is made between citizens of the same state, the power to grant a discharge is not impaired by a subsequent removal of the creditor to another state : *Stoddard v. Harrington*, 100 Mass. 87.

X. Marriage not a Contract.—The constitutionality of legislative divorces has involved the question how far and to what purposes marriage may be considered a contract. A few sporadic cases have held that it is purely and simply a contract, and therefore within the constitutional limitation now under consideration ; *Ponder v. Graham*, 4 Fla. 23 ; *Bryson v. Bryson*, 44 Mo. 232. But the overwhelming weight of authority is to the effect that, while certain contractual elements do indeed enter into the marriage rela-

tion, it is more properly to be regarded as a *status*; and therefore an act of the legislature destroying the marital status of two persons is not a "law impairing the obligation of contracts:" *Maguire v. Maguire*, 7 Dana 188; *Adams v. Palmer*, 51 Me. 481; *Cronise v. Cronise*, 54 Penn. St. 255; *Carson v. Carson*, 40 Miss. 349; *Noel v. Ewing*, 9 Ind. 37; Story on Conf. Laws, § 108 and note; 2 Whart. on Cont. § 1069; 1 Bishop Mar. & Div. §§ 667, 669.

XI. *Not Applicable to Actions on Torts*.—It seems to be well settled that a claim founded upon a tort, whether it has passed into judgment or not, cannot be considered a contract under this clause of the federal constitution; because in either case, it lacks one of the vital elements of a contract, the assent of the parties; *McAfee v. Covington* (Sup. Ct. of Ga., 1884), 17 Reporter 552; *Garrison v. New York*, 21 Wall. 196; 2 Wharton on Cont. § 1070, and case cited.

XII. *Distinction between Obligation and Remedy*.—Of all the complications which have arisen under the general topic, and presented themselves for solution, there is perhaps none which has been productive of greater embarrassment and confusion than the distinction between the obligation of the contract and the remedy for its enforcement. We propose first to review the authorities which have taken this troublesome question in hand, and then to see what deductions can be drawn from them. In the first place, then, the obligation of a contract may be roughly defined as the duty of each of the contracting parties to perform his share of it, and the right (since right and duty are here correlative terms), of the party who keeps the agreement to exact specific performance, or compensation in damages, from the party who breaks it. The remedy is the means provided by the state for the enforcement of that right. Accordingly it was said at an early day, by Chief Justice MARSHALL: "The distinction between the obligation of a contract and the remedy given by the legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct:" *Sturges v. Crowninshield*, 4 Wheat. 200. Then followed the case of *Bronson v. Kinzie*, 1 How. 311, where the court said: "And although a new remedy may be deemed less convenient than the old one, and may in some degree render the collection of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. What-

ever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the constitution." Soon after it was held that a certain law in regard to sales of property on execution so far *obstructed* the remedy as to impair the contract, and was therefore unconstitutional: *McCracken v. Hayward*, 2 How. 608. And see *Gunn v. Barry*, 15 Wall. 610; *Green v. Biddle*, 8 Wheat. 1; *Butz v. Muscatine*, 8 Wall. 575; *Planters Bank v. Sharp*, 6 How. 301. In the case of *Van Hoffman v. Quincy*, 4 Wall. 535, it was stated that if these doctrines were still open to discussion, the soundness of the distinction between obligation and remedy, might well be doubted. And a recent case (*Edwards v. Kearzey*, 96 U. S. 595), holds that the law of the remedy, as it exists at the making of the contract, enters into it and forms a part of its obligation, in so far that any subsequent change of remedy which tends to essentially lessen or impair the value of the contract, is unconstitutional. Turning now to the state reports we find a number of cases holding generally that whatever pertains to the remedy merely may be altered at the will of the legislature, provided a substantive remedy is left to the creditor, and no material rights are destroyed: *Rathbone v. Bradford*, 1 Ala. 312; *Paschal v. Perez*, 7 Texas 348; *Holland v. Dickerson*, 41 Iowa 367; *Cutts v. Hardee*, 38 Ga. 350. Again, it is held that a law changing the remedy and rendering it less speedy and convenient, is not invalid, if there be still a substantial remedy left: *James v. Stull*, 9 Barb. 482. But if the law imposes so many obstacles in the way of enforcing a class of contracts as to leave the right scarcely worth pursuing, it impairs their obligation: *Oatman v. Bond*, 15 Wis. 20; *Smith v. Morse*, 2 Cal. 524. And so a statute which takes away *all* remedy is clearly unconstitutional: *Bruce v. Schuyler*, 4 Gilm. 221; *State v. Bank of the State*, 1 S. C. 68. Another decision states that although the legislature cannot substitute a nugatory remedy for a good one, they can substitute another good one; parties have a vested right to some remedy substantially as good as the old one, but not to that particular one: *Lockett v. Uery*, 28 Ga. 345. Again, it is said that there is a distinction in favor of the constitutionality of an act which prolongs or revives a remedy, as compared with one which cuts off or takes

away the remedy: *Caperton v. Martin*, 4 West Va. 138. And whereas it is sometimes suggested that the contract is made with reference to all laws existing at the time, a Minnesota decision holds that only such laws become a part of the contract as would be enforced by courts of a foreign jurisdiction—such as have the full force of law wherever the contract is sought to be enforced—which of course excludes purely remedial legislation: *Heyward v. Judd*, 4 Minn. 483. And lastly, it is said that in determining whether a change in the remedy is reasonable and just, the courts must look behind the statute to the state of the country, and the causes which led to the enactment of the new remedy: *Baumbach v. Bade*, 9 Wis. 559.

It will have become apparent from the foregoing review that, notwithstanding some fluctuation of opinion, the United States courts (and, under their lead, the state courts,) have been led to the adoption of two positions not reconcilable without a compromise. First, that whatever pertains merely to the remedy is no part of the contract and may be modified at the will of the legislature. Second, that it is possible to alter the remedy in such a manner as to impair the obligation of the contract itself. As a resultant of these two positions, they have made the rule to rest on the *extent* to which the change in the law affects the remedy and, through it, the contract; holding that when the law destroys the remedy altogether, or renders it practically worthless, or invades it in a material point, or lessens the value of the contract, it is in contravention of the constitution. Although this has been repeatedly characterized as an “unhappy” distinction, it is, after all, the only possible means of escape from holding, on the one hand, that the remedy cannot be modified at all, or on the other hand, that it may be desiccated or destroyed. But that it opens up a very wide ground of debate will be sufficiently apparent from the following section.

Before proceeding further, however, it is important to be observed that if the parties to a contract include in it, in express terms, the remedy for its enforcement, subsequent legislation changing the remedial process which they have agreed upon is, as to them, inoperative. “If they do not prescribe the rule of remedy in their contract, the law-making power is free; but if they do, they become a law to themselves, and the legislature must let them alone:” *Billmeyer v. Evans*, 40 Penn. St. 324; *Taylor v. Stearns*, 18 Gratt.

244; *Duerson v. Alsop*, 27 Id. 230; 2 Daniel on Neg. Instr. § 970 a.

XIII. *Examples*.—Taking the conclusions arrived at in the last section, therefore, as correctly expositive of the present state of the law, we proceed to adduce some examples and illustrations, for the purpose of showing in what cases the courts have held changes in remedial legislation so material as to impair the obligation of the contracts affected by them, and where not. And in the first place, it is competent for the legislature to pass statutes of limitation, prescribing the time within which actions shall be brought on demands already accrued, provided the time is not so unreasonably shortened as to practically deprive parties of their remedy altogether: *Griffin v. McKenzie*, 7 Ga. 163; *Cox v. Berry*, 13 Id. 306; *Call v. Hagger*, 8 Mass. 430; *Holcombe v. Tracy*, 2 Minn. 241; *Maltby v. Cooper*, 1 Morris (Iowa) 59; *Pearce v. Patton*, 7 B. Mon. 162; *Billings v. Hall*, 7 Cal. 1. But where such a statute allows only thirty days for the commencement of suits on existing debts, it must be regarded as unconstitutional; because that time is unreasonably and oppressively short: *Berry v. Ransdall*, 4 Met. (Ky.) 292. And where property rights have been acquired by virtue of a limiting act, they cannot be divested by a subsequent statute enlarging the time for bringing suit: *Sprecker v. Wakeley*, 11 Wis. 432. So also it is allowable for the legislature to grant a stay of execution on judgments, or otherwise postpone the collection of debts, so it be for a limited and not unduly protracted period: *Farnsworth v. Vance*, 2 Cold. 108; *United States v. Conway*, 1 Hempst. 313; *Chadwick v. Moore*, 8 W. & S. 50; *Coze's Ex'r v. Martin*, 44 Penn. St. 322; *Newkirk v. Chapron*, 17 Ill. 344. But where the provisions of the act are such that the stay taken under it may be indefinitely, even perpetually, extended, it touches the remedy in a vital point and is unconstitutional: *Bunn v. Gorgas*, 41 Penn. St. 441. As to whether exemption laws could apply to judgments entered before their passage, there has been some difference of opinion. It has been held that a law which prohibits a levy on a portion of the debtor's property which was previously subject to an existing judgment is unconstitutional: *Forsyth v. Marbury*, R. M. Charl't. 324; *Vedder v. Alkenbrack*, 6 Barb. 327; *Quackenbush v. Danks*, 1 Denio 128. The last named case was affirmed by the New York Court of Appeals in *Danks v. Quackenbush*, 1 Comst. 129; but as the opinion there was given by an equally divided court,

it was not considered as entitled to the weight of a precedent ; and the same court, in a later case (*Morse v. Gould*, 11 N. Y. 281), arrived at an exactly opposite opinion, conceiving that although a law may be regarded as impairing the obligation of the contract when it so embarrasses the remedy as to substantially defeat the rights of the creditor, yet a statute exempting certain property would not be likely to have that effect in the large mass of instances, though isolated cases might occur where the exempted articles would constitute the debtor's whole property. And this decision may be regarded as sound law : *Coriell v. Ham*, 4 Greene (Iowa) 455 ; *Stephenson v. Osborne*, 41 Miss. 119 ; *Taylor v. Stockwell*, 66 Ind. 505. But see *Gunn v. Barry*, 15 Wall. 610. Again, it is universally held that laws abolishing imprisonment for debt do not touch the obligation of the contract : *Sturges v. Crowninshield*, 4 Wheat. 200 ; *Gray v. Munroe*, 1 McLean 523 ; *Newton v. Tibbatts*, 2 Eng. 150 ; *Bronson v. Newberry*, 2 Doug. 38 ; *Ware v. Miller*, 9 S. C. 13. Nor is there any constitutional objection to the repeal of an extraordinary remedy given to a particular class of creditors by a previous statute : *Stocking v. Hunt*, 3 Denio 274. So the legislature may change the remedies provided for the collection of rents, *e. g.*, by abolishing distress and substituting the action of ejectment in its stead : *Van Rensselear v. Snyder*, 13 N. Y. 299. So also of statutes regulating the joinder of parties in suits on negotiables : *McMillan v. Sprague*, 4 How. (Miss.) 647 ; *Augusta Bank v. Augusta*, 49 Me. 507. Nor can a right be said to be impaired by a statute which merely imposes an additional duty on the owner, as necessary to its preservation : *Tarpley v. Hamer*, 9 Sm. & Mar. 310 ; *Curtis v. Whitney*, 13 Wall. 68. Again, a law prescribing that no action shall be maintained on any special promise to pay a debt from which the debtor has been discharged under the bankrupt law or state insolvent law, unless such promise be in writing and signed by the debtor, has been held constitutional and valid as applied to pre-existing verbal promises, the court saying : " The act * * * simply gives a rule of evidence as to the proof of a new promise to revive the old debt : or, in other words, declares that the law will furnish no remedy to enforce such a promise, unless it is in writing. The law has relation to the remedy and not to the validity of the contract : " *Kingley v. Cousins*, 47 Me. 91. And generally, a law which establishes a rule of evidence as to certain past transactions, cannot be regarded as within the pro-

hibition : *Herbert v. Easton*, 43 Ala. 547; *Williams v. Haines*, 27 Iowa 251; *Rutland v. Copes*, 15 Rich. 84; *Kirtland v. Molton*, 41 Ala. 548. But on the other hand, where a mortgage contained a power to the creditor to sell on breach of condition, it was held that a subsequent law giving the mortgagor twelve months to redeem the property from the purchaser at such sale, so altered the remedy of the creditor as to impair the obligation of the contract. *TANEY*, C. J., said : " If such rights may be added to the original contract by subsequent legislation, it would be difficult to say at what point they must stop. An equitable interest in the premises may, in like manner, be conferred upon others ; and the right to redeem may be so prolonged as to deprive the mortgagee of the benefit of his security, by rendering the property unsalable for anything like its value : " *Bronson v. Kinzie*, 1 How. 311 ; *Howard v. Bugbee*, 24 Id. 461 ; *Malony v. Fortune*, 14 Iowa 417. And again, a state law forbidding property levied on execution to be sold for less than two-thirds of its appraised value, so far obstructs the remedy as to impair the obligation of the contract, and cannot apply to debts accrued before its passage : *McCracken v. Hayward*, 2 How. 608 ; *Moore v. Fowler*, 1 Hemp. 536.

XIV. *State Constitutions*.—State constitutions are " laws " within the meaning of the limitation : *Railroad v. McClure*, 10 Wall. 511 ; *Lehigh Valley Rd. Co. v. McFarlan*, 31 N. J. Eq. 706. But " there is nothing in the constitution of the United States which forbids Congress to pass laws violating the obligation of contracts, although such a power is denied to the states individually : " *Evans v. Eaton*, Pet. C. C. 337.

H. CAMPBELL BLACK.

Williamsport, Pa.

RECENT ENGLISH DECISIONS.

High Court of Justice ; Probate Division.

HAWKINS v. HAWKINS & HOPE.

A petitioner and respondent separated by mutual consent shortly after the marriage, and only met once afterwards. The petitioner allowed her a small sum for her support, and sixteen years after the marriage discovered that she had committed adultery : *Held*, under the circumstances, that the petitioner had condoned to the adultery. Petition dismissed.

THIS was a petition for the dissolution of marriage by reason of the adultery of the wife.

The parties were married on the 13th of July 1863, at St. James' Church, Piccadilly. The petitioner had become acquainted with the respondent (who was a shop girl) some short time previously, and had been improperly intimate with her, and compelled by her father to marry her. At the time of the marriage the petitioner was entirely dependent upon his uncle and aunt, and it was arranged between him and the respondent that the marriage should be kept secret.

A few days after the marriage the parties separated and never cohabited again, the petitioner allowing his wife from 2*l.* to 4*l.* a month, which he remitted to her by letter. They met once at Charing Cross about sixteen years after the marriage, when something was said about living together, but neither party seemed desirous of doing so. With that exception they had not seen each other until shortly before the institution of this suit, when the petitioner discovered that the respondent had been, for some years, living in adultery. The petitioner's uncle died in 1870 leaving all his property to the aunt, and she died in 1881, bequeathing a considerable fortune to the petitioner.

The respondent's adultery was proved, and she was called as a witness in support of her case.

Sir J. HANNEN (President).—The petitioner in this case seduced the respondent when she was a young woman, and her father having brought pressure upon him to marry her, the petitioner required her to keep the marriage secret, as if it was known to the uncle and aunt they would not leave him their property; but even after the uncle's death the petitioner continued to live apart from his wife, although he introduced her to his aunt as the person whom he intended to marry. Every husband is bound to give his wife that protection which the society of a husband affords, and the fact that the respondent had been familiar with him before marriage made that duty more incumbent upon him, she being a person who might be more likely to yield to temptation. Having regard, therefore, to the petitioner's conduct in leaving his wife without a husband's protection, and being of opinion that that conduct conduced to her adultery, I consider that he is not entitled to a dissolution of his marriage.

Petition dismissed with costs.

Collusion and connivance, it is universally agreed, prevent a husband from obtaining a divorce. They both are but phases or shades of the same disposition,

intent, desire or willingness on the part of the husband that his wife shall commit some act, which is by statute made a cause of divorce. The divorce statutes seldom, if ever, expressly declare that such conduct of the husband shall bar his divorce, but inasmuch as their language generally is that divorces "may be" granted for such and such causes, the courts practically interpret it to mean that in some cases they may not be, and that in their discretion they can and will refuse it, although the act alleged be fully proved, if the husband himself has been a consenting party, though not guilty of any similar act, or of any conduct warranting a divorce on the wife's application.

Indeed, the law of recrimination rests upon a similar ground. The statute law does not expressly say that adultery by the husband is an absolute bar to obtaining a divorce from the wife for the same cause, nor *vice versa*.

But the courts refuse to exercise their power in all such cases, on the broad ground that a party guilty of violating the marriage bond shall not have the assistance of the court to enforce any marital right: *Hope v. Hope*, 1 Sw. & Tr. 107.

And connivance is a bar therefore, on the broad general ground that consent takes away any remedy. *Volenti non fit injuria*.

Therefore, it was held in *Pierce v. Pierce*, 3 Pick. 299 (1825), that though the adultery of the wife was proved, the divorce must be refused, because there was "reason to think that the husband was the cause of its being committed." "It would be," say the court, "a dangerous principle to establish, that a husband who had suspicions of the infidelity of his wife, shall be allowed to lay a train which may lead her to the commission of adultery, in order that he may take advantage of it to obtain a divorce. As we are clear that the adultery proved was committed with the knowledge and

consent of the libellant, and probably with his connivance, a divorce will not be granted."

Actual "connivance," therefore, is always recognised as a bar to a decree. See *Cairns v. Cairns*, 109 Mass. 408.

The more delicate question is what state of mind, or will, on the part of a husband, not amounting to contrivance or connivance exactly, but merely willingness, or perhaps indifference on his part is sufficient to have the same effect. This question arose in *Morrison v. Morrison*, 136 Mass. 310 (1884), in which the judge who tried the cause found simply this state of facts: "The husband did no act directly to encourage the adultery in his wife, and he did nothing to prevent it. He went to bed early, sometimes leaving her and another man together in the sitting room, and suspecting that they might commit adultery, and knowing that the detective previously employed by him, would probably be on the watch to discover it; he made no remonstrance or objection against their being together; he concealed his suspicions from both of them; he took no pains to protect her from seduction. And from the various circumstances," said the judge, "I find that from the time when his suspicions were first excited, he was in his own mind willing that she should commit adultery, provided he could thereby obtain a divorce; and he expected that she would commit adultery, and that he should obtain proof of it, and thus be enabled to procure a divorce." And his refusal to grant a divorce was sustained by the full court, on his report whether his decision was right. The court say that this was sufficient to warrant the finding of connivance, whether they should or should not have drawn the same inference from the existing facts. If there was any mistake here, it was in drawing too unfavorable a conclusion against the husband from the facts actually proved. The presiding judge does not exactly say, on his

report, that he found the actual fact of a "connivance," although the court above seem to have so considered it.

Mr. Bishop, in his valuable book on Marriage and Divorce, thus states the law on this point :

"The law requires the husband to watch over the morals of his wife ; and protect her against associations which might expose to hazard her purity, or by lowering her standard of virtue, prepare the way for the approaches of the seducer. Hence, while his want of attention to her selection of associates, to her morals, and to her conduct in other respects, is not of itself connivance, it may be strong, sometimes satisfactory evidence of it:" 2 Mar. and Div., sect. 17. Elsewhere he says, that though connivance may be passive as well as active, yet there must be a complete consent on his part ; and there can be no connivance without such consent, active or passive ; and as the law does not take cognisance of thought merely, there must be some act, word, or omission of duty blending with a passive willingness to have the wrong committed. And that a real intention to have the wife transgress, or at least an intention to allow her to do so undisturbed and unprevented, must exist in order to amount to connivance, very distinctly appears from the important cases of *Phillips v. Phillips*, 3 Notes of Cases 444 ; 4 Id. 524 ; *Moorsom v. Moorsom*, 3 Hagg. 105 ; *Hoar v. Hoar*, Id. 137 ; *Hoges v. Hoges*, Id. 123.

Elsewhere, however, it is said, that "willing acquiescence in the continuation of an adulterous intercourse by the other party is sufficient." See *Boulting v. Boulting*, 3 Sw. & Tr. 335 (1864).

The necessity of corrupt intention to constitute connivance, was also distinctly held by the Supreme Court of Massachusetts, in the very recent case of *Robbins v. Robbins*, yet unreported. The evidence there clearly showed a scheme to detect the libellee in adultery if she was

guilty, but no corrupt intent that adultery should be committed, nor any consent to it, or connivance at it. And it was held that the husband was entitled to his divorce.

But whatever may be the law of connivance, or from whatever acts that fact may be considered as sufficiently proved, it is obvious that the principal case goes a step further—and a very important step further—in the law of divorce. It is not claimed that the husband in any way consented, assented, or desired the adultery of his wife, or knew of its probability, or that she was actually exposed to any danger. The whole averment simply is, that by separating from her, by mutual consent, he thereby, although continuing to support her, exposed her to danger, and therefore "conduced" to the violation of her marriage vow. If this be legal cause for refusing a divorce, few divorces would be granted. It is comparatively seldom there is not some fault, or neglect, to be found on the part of the husband, ere a wife will be guilty of such misconduct. And if such acts, merely as inattention, neglect, and the like, establish "conducement," and so bar him from divorce for her adultery, it can be but regarded as establishing a very important principle in this branch of the law.

Perhaps the strongest case in our American courts looking to such a conclusion is that of *Barber v. Barber*, 14 Law Rep. 375 (1851) in the Superior Court of Connecticut. The libel by the husband was on the ground of "habitual intemperance." The defence was that the wife, being sick and nervous, acquired the habit of taking large quantities of morphine, which the husband procured for her, with the advice of her physician ; and that subsequently, in order to wean her from its use, she, with his advice, began to take large quantities of gin, which he procured for her. This was held to prevent him from obtaining his divorce, although the judge

said : "In all this I don't say the husband intended the ruin of his wife, and was looking for a divorce as the consequence ; but if the legal presumption be applied, that any man is to be presumed to intend the legitimate consequences of his deliberate acts, such a conjecture is not unreasonable." There were some other circumstances, however, tending to show that the husband had become more or less attached to a female servant in his employment, though no criminal con-

duct was alleged or shown ; but it was thought that this might have led the wife to the more frequent use of morphine, and so tended to form the habit complained of.

The doctrine of conducement merely, without connivance, desire, or intention that adultery should be committed, must be more fully examined and considered before it can be held to be clearly established.

EDMUND H. BENNETT.

Boston.

RECENT AMERICAN DECISIONS.

Indiana Supreme Court.

CITY OF NORTH VERNON v. VOEGLER.

Where there is one cause of action all the damages must be recovered in one suit, and for fresh damages resulting from the original wrong, a second action cannot be maintained.

Where the cause of action is the negligence and unskilfulness of the officers of a municipal corporation in the improvement of a street, the injury is complete and permanent, constituting but one cause of action, and in a suit on that cause of action all damages present and prospective may be recovered, and for fresh damages resulting from the improvement, a second action will not lie.

Mitchell v. Darley Main Colliery Co., 24 Am. L. Reg. (N. S.) 432, and *Brunsdon v. Humphrey*, Id. 369, criticised and distinguished.

Semble: A temporary wrong might be done under such circumstances as would make it reasonable to presume that the defendants would right the wrong before a recurrence of harm or loss, and in such cases a second action might lie for fresh damage.

Although a municipality is not liable for errors of judgment in devising a plan of improvement, it is liable if the lack of care and skill in devising the plan is so great as to constitute negligence.

APPEAL from Jennings Circuit Court.

John G. Berkshire, for appellant.

The opinion of the court was delivered by

ELLIOTT, J.—There are two paragraphs in the appellee's complaint, both alleging that the appellant so negligently and unskilfully graded one of its public streets as to change the flow of surface water, gather it in one channel, and pour it upon the lots of the appellee, greatly injuring her property.

The first paragraph of the complaint differs from the second in

one particular, and that is in alleging that a former action was commenced by the appellee which resulted in a judgment in her favor. The allegations upon this subject are these: "That in September 1879 the plaintiff brought suit against the defendant for the damages then accrued to her by reason of the overflowing and injury of her premises up to that time; that in March 1880 she recovered judgment in that action for eighty dollars so accrued up to September 1879; that all of said overflowings of said premises have continued, as also the other said injuries to plaintiff's premises ever since September 1879, when the former action was brought, but the defendant has done nothing and made no effort to change or prevent said flow of water over the lot of plaintiff." On these averments the appellant founds the objection to the complaint that it shows on its face that the matter pleaded has been adjudicated; but as there are answers which more clearly present the question, we defer our consideration of it until we take up those answers.

The second paragraph of the answer is in substance this: That the improvement of the street was made under an ordinance and a plan of the common council, duly enacted and adopted; that the improvement of the street was, in the judgment of the common council, necessary and proper; and that the injuries complained of were the unavoidable result of the improvement of the street.

The sufficiency of this answer is sought to be maintained upon the decision in *Rozell v. City of Anderson*, 91 Ind. 591, but that decision is very far from sustaining such an answer as the one before us. In that case the evidence was not in the record, as the opinion shows, and the court was simply called upon to determine whether the instruction assailed was correct upon any supposable state of the evidence admissible under the issue in the case. We have no doubt that the ruling in that case was right upon the question as the record presented it. We hold now, as we held then, that, as an abstract rule of law, a municipal corporation is not liable for mere errors of judgment as to the plan of a public improvement; but we did not then hold, nor do we now hold, that for negligence, whether in the plan of the work or its execution, a municipal corporation is not liable. That we did not then hold that for negligence the municipal corporation is not liable is evident from the fact that the court, in the opinion given in that case, cites with approval the cases which hold a municipal corporation liable for negligence in the plan of an improvement as well as in the

manner of executing the work. We have many cases, extending from *City of Indianapolis v. Huffer*, 30 Ind. 235, down to *City of Crawfordsville v. Bond*, 96 Id. 236, holding that for negligence in devising a plan, as well as for negligence in executing it, the municipal corporation is liable. This was, in effect, the decision in the case appealed to this court by the appellant, involving the sufficiency of just such an answer as that now before us: *City of North Vernon v. Voegler*, 79 Ind. 67. The question was fully considered, and the authorities cited in the cases of *City of Evansville v. Decker*, 84 Ind. 325; *Cummins v. City of Seymour*, 79 Id. 491; s. c. 41 Amer. Rep. 618; *Weis v. City of Madison*, 75 Ind. 241; s. c. 39 Amer. Rep. 135; *City of Indianapolis v. Tate*, 39 Ind. 282; *City of Indianapolis v. Lawyer*, 38 Id. 348. The doctrine is not only sustained by authority, but is sound in principle. Suppose that a common council of a city determine to build a sewer and cover it with reeds, can it be possible that the corporation can escape liability on the ground that the common council erred in devising a plan? Or, to take such a case as *City v. Huffer*, suppose the common council undertake to conduct a large volume of water through a culvert capable of carrying less than one-tenth of the water conducted to it by the drains constructed by the city, can responsibility be evaded on the ground of an error of judgment? Again, to take an illustration from a somewhat different class of cases, suppose the common council to devise a plan for a bridge that will require timbers so slight as to give way beneath the tread of a child, can the city escape liability on the ground that there was only an error of judgment in devising the plan?

Illustrations might be indefinitely multiplied, but it is unnecessary to pursue the subject. The only rule that has any valid support in principle is, that for errors in judgment in devising a plan there is no liability, but there is liability where the lack of care and skill in devising the plan is so great as to constitute negligence. Our decisions have long and steadily maintained that municipal corporations are not responsible for consequential injuries resulting from the grading of streets where the work is done in a careful and skilful manner; but they have quite as steadily maintained that where the work is done in a negligent and unskilful manner, the corporation is liable for injuries resulting to adjacent property: *City of Kokomo v. Mahan*, 100 Ind. 242, 246; *City of Crawfordsville v. Bond*, *supra*; *Princeton v. Gieske*, 93 Ind. 102; *Weis v. City*

of *Madison*, 75 Id. 241; s.c. 39 Amer. Rep. 135; *City of Evansville v. Decker*, *supra*, and authorities cited; *Macy v. City of Indianapolis*, 17 Ind. 267.

The complaint in this case very fully alleges the negligence and unskilfulness of the defendant, and an answer admitting these allegations cannot avoid them by averring, as the one before us does, that the negligence and want of skill were not in doing the work, but in devising the plan. We have not considered the fugitive denials cast into the answer, for the reason that it is now well settled that pleadings are to be judged by their general scope and tenor, and not by detached and isolated statements thrown into them: *Neidefer v. Chastain*, 71 Ind. 363; *W. U. Tel. Co. v. Reed*, 96 Id. 195, 198.

There are several paragraphs of answer pleading a former adjudication, and we perceive no substantial difference between them; but, as we are not aided by a brief from the appellee, and as the third paragraph presents the question in a clearer light than the others, we confine our investigation and decision to that paragraph. The material averments of this paragraph, exhibited in a condensed form, are these: On the eighteenth day of September 1879, the appellee filed her complaint in the Jennings Circuit Court against the appellant, and in the action thus begun the appellee recovered judgment for \$80 at the March term, 1880. This judgment remains in full force. The complaint in that action stated as a cause of action the injuries to the same property from the same negligent and unskilful improvement of the same street as that described and charged in the present action. The appellant has made no other improvement than the one described in the former complaint, and the injuries resulting to appellee's property were such only as were caused by the improvement made prior to the filing of the complaint in the action begun in September 1879. The concluding averment of the answer is this: "And it is the grading of the same street, and the building of the same culverts, and the identical negligence and want of care and skill now complained of, that was complained of in the former action, and no other."

The answer presents a question of great importance and much difficulty. The theory of the appellee, as we infer from the record, is that the former action embraced only such damages to the real estate as occurred prior to the recovery of the judgment in that action. The theory of the appellant is that the former action

embraced all damages resulting to the appellee's property from the negligent improvement of the street, and that a second action cannot be maintained for the same breach of duty that formed the basis of the first action. There is a material distinction between damages and injury. Injury is the wrongful act or tort which causes loss or harm to another. Damages are allowed as an indemnity to the person who suffers loss or harm from the injury. The word "injury" denotes the illegal act; the term "damages" means the sum recoverable as amends for the wrong. The words are sometimes used as synonymous terms, but they are, in strictness, words of widely different meaning. There is more than a mere verbal difference in their meaning, for they describe essentially different things. The law has always recognised a difference between the things described, for it is often declared that no action will lie because the act is *damnum absque injuria*. Brown Leg. Max. 195; Weeks Dam. Inj. 7; Brown Comm. (4th ed.) 75, 621. In every valid cause of action two elements must be present, the injury and the damages. The one is the legal wrong which is to be redressed; the other, the scale or measure of the recovery. Mayne Dam. 1; 1 Suth. Dam. 3. As there may be damages without an injury, so there may be an injury without damages. It has been many times said that no action will lie because the injury produced no damages, or, as the law phrase runs, the wrong is *injuria sine damno*. The distinction between injury and damages is an important one in this instance, and for this reason we have been careful to mark the difference and to enforce our statement by reference to authorities, although the principle involved is a rudimentary one. The distinction is important, for the reason that the law is that fresh damages without a fresh injury will not authorize a second or subsequent action. The rule is thus tersely stated in *Warner v. Bacon*, 8 Gray 397: "A fresh action cannot be brought unless there be both a new unlawful act and fresh damage." The rule is illustrated by many cases. Mr. Mayne refers to the case of *Howell v. Young*, 5 Barn. & C. 259, and commenting on it, says: "The statute of limitations runs from the act of negligence, not from the time an injury accrues. Such injury is merely a consequential damage, not a fresh cause of action. The damages, then, in the original action must cover all the loss that can ever arise, because no such loss can afterwards be compensated." Mayne Dam. 611. An American author says: "A cause of action and the damages recoverable therefor are an entirety. The

party injured must be plaintiff, by the common law, and he must demand all the damages which he has suffered or ever will suffer from the injury, grievance, or cause of action, upon which his action is founded. He cannot split a cause of action and bring successive suits for parts because he may not be able to prove at first all the items of the demand, or because all of the damages have not been suffered." 1 Suth. Dam. 175. The rule we are discussing applies to cases of personal injuries, for, among the earliest of the reported cases, we find it laid down for law that in an action for trespass to the person the recovery of damages must be once for all, including past as well as prospective damages. *Fetter v. Beale*, 1 Salk. 11; s. c. 1 Ld. Raym. 339. In *Hodsoll v. Stallebrass*, 39 E. C. L. 301, it was held that both injury and damage must concur to give a cause of action; that the damages were not the sole cause of action; and the jury were directed to assess both present and prospective damages, because a second action could not be brought for damages resulting from the same injury.

Upon this ancient doctrine rest the cases which hold that where personal injuries are received from the negligent act of a carrier of passengers, or are caused by the negligence of a municipal corporation, all the damages, present and prospective, must be assessed in one action, because a second action cannot be brought. *Town of Elkhart v. Ritter*, 66 Ind. 136; *Weisenberg v. City of Appleton*, 26 Wis. 56; *Whitney v. Clarendon*, 18 Vt. 252; s. c. 46 Amer. Dec. 150; 1 Suth. Dam. 197, authorities in note, p. 198. Mr. Mayne, in discussing this general subject, says: "Similar questions often arise in cases where a person, by digging, mining, building, or the like, affects the plaintiff's house in such a manner as to produce injurious consequences which manifest themselves at a later period. Here it is now well settled that all subsequent or recurring damages may be assessed, and can only be recovered in a suit brought upon the original cause of action." Mayne Dam. 138. In *Backhouse v. Bonomi*, 9 H. L. Cas. 503, the doctrine declared by the author from whom we have quoted is asserted. There is, however, a later English case which seems to break in upon the rule of the earlier cases, and to shake, in some degree at least, their authority. It does, indeed, expressly overrule the case of *Lamb v. Walker*, 3 Q. B. Div. 389. The case to which we refer is *Mitchell v. Darley Main Colliery Co.*, 24 Amer. Law Reg. 432. If that case can be regarded as well decided, it must be deemed an exception to the

general rule, for the general rule is that one action, and one only, can be maintained for a breach of duty constituting a tort. The English court seems to have gone still further in opposition to the ancient rule in *Brunsdan v. Humphrey*, 24 Amer. Law Reg. 369; but in that case Chief Justice COLERIDGE dissented, and an able reviewer says: "It certainly seems that the reasoning of COLERIDGE, C. J., is more in harmony with the established rule of law. And it should be noted that the opinion of POLLOCK, B., and LOPES, J., in the court below (11 Q. B. Div. 712), were on the same side, so that really the majority of the judges who have expressed opinions on the subject are against successive actions in such cases." Id. 378. These English cases may, however, be distinguished from the one we are discussing, for, in this case the improvement of the street was a permanent one, while in the only one of these English cases that is analogous to the present, the act out of which the wrong arose was of a different character.

The case before us is closely analogous to the seizure of land under the right of eminent domain for railroad or highway purposes, and in all such cases it is held, both by the English and the American courts, that all the damages, present and prospective, must be assessed in one proceeding: *Lafayette, &c., Co. v. New Albany, &c., Co.*, 13 Ind. 90; *Montgomery, &c., Co. v. Stockton*, 43 Id. 328; 1 Suth. Dam. 191. In the case of *Powers v. Council Bluffs*, 45 Iowa 652; s. c. 24 Amer. Rep. 792, the city cut a ditch along the side of plaintiff's lot and caused his land to be overflowed, and it was declared that the cause of action was complete when the unlawful act was committed, and that all the damages accruing from the original wrong must be included in one action. It is true that this case has been criticised, but the criticism does not affect its force upon the point to which we cite it: Wood St. Lim. 372. The criticism upon the case is that the court erred in holding that the cause of action accrued when the ditch was dug, for the reason that no damages at all accrued until some time after the ditch was dug, and until the damages did accrue there was no complete cause of action. Conceding, but not deciding, that the criticism is just, it does not break the force of the decision as applied to this case; for here there were both damages and injury before the first action was commenced, and Mr. Wood concedes, or rather affirms, that if the element of damages had been present in the case cited the decision would be right. In *Town of Troy v. Cheshire Rd.*, 23

N. H. 83, it was held that, "in case for nuisance, if the act done is necessarily injurious and is of a permanent character, the party injured may at once recover his damages for the whole injury." In that case the injury to the town was done by the construction of a railroad, and the court said: "The injury done to the town is, then, a permanent injury, at once done by the construction of the railroad, which is dependent upon no contingency of which the law can take notice, and for the injury thus done they are entitled to recover at once their reasonable damages." It is true, in the present case, as it was in the one referred to, that the improvement of the street was a permanent one, and, as it was permanent, the cause of action was complete when damages resulted, and the recovery must be, not for part of the damages, or for some damages, but for all the damages resulting from the wrong which constituted the cause of action. Turning to a somewhat different line of cases, we find running through them all the same general principles found in the cases we have cited. Thus, in actions against an attorney for negligence, the rule is that all loss resulting from the wrong must be recovered in one action, and no subsequent action can be maintained; *Wilcox v. Plummer's Ex'rs*, 4 Pet. 172; *Moore v. Juvenal*, 92 Penn. St. 484; *Campbell's Adm'rs v. Boggs*, 48 Id. 524; *Downing v. Garard*, 24 Id. 52; *Miller v. Wilson*, Id. 114; *Owen v. Western Saving Fund*, 97 Id. 47; s. c. 39 Amer. Rep. 794; *Howell v. Young*, 5 Barn. & C. 259.

In *Owen v. Western Saving Fund*, *supra*, the last case cited was approved, and it was said of it: "And in this case it was held that special damages resulting from a breach of duty do not constitute a fresh ground of action, but are merely the measure of the injury resulting from the original cause." The general principle we are discussing was involved in the case of *Richardson v. Eagle Machine Works*, 78 Ind. 422, where it was held that an agent who elected to bring an action for wages could not bring a second action to recover damages for a breach of the contract stipulating that the employment should continue for one year. In *Crosby v. Jeroloman*, 37 Ind. 264, the court quoted with approval from the opinion in *Secor v. Sturgis*, 16 N. Y. 548, the following: "I admit that the rule does not extend to several and distinct trespasses or other wrongs, nor, as we have seen, to distinct contracts. It goes against several actions for the same wrong and against several actions on the same contract." The general rule, as stated by a recent

author, is this: "When a wrong is done which produces an injury which is not only immediate, but from its nature must necessarily continue to produce loss independent of any subsequent wrongful acts, then all the damages resulting, both before and after the commencement of the suit, may be estimated and recovered in one action:" 3 *Suth. Dam.* 403. In *Adams v. Hastings, &c., Co.*, 18 *Minn.* 265 (*Gil.* 236), this rule was enforced. The court, speaking of the construction of a railroad, said: "And if such erection necessarily caused the surface water to stand upon the plaintiff's land and run into his cellar and well, he could recover therefor in the same action, though such injury might not accrue for some time after the completion of the road-bed and track." This general principle is also maintained in *Seely v. Aldern*, 61 *Penn. St.* 302.

There are many cases declaring and enforcing the general rule that the plaintiff may recover in one action all the damages he suffers, whether retrospective or prospective, where the injury which causes the loss or harm is of a permanent character, as a street, a canal, or a railroad. All things that proximately contribute to the injury may be taken into consideration in estimating the damages, and if the injury extends so far as to totally destroy the value of the property, then damages equal to the value of the property may be awarded. Mr. Freeman states the rule very strongly. His statement is this: "All the damages which can by any possibility result from a single tort form an indivisible cause of action." He also says: "For damages alone no action can be permitted. Hence, if a recovery has once been had for the unlawful act, no subsequent suit can be sustained:" *Freem. Judgm.*, § 241. The cases of *Cadle v. Muscatine W. R. Co.*, 44 *Iowa* 11; *Finley v. Hershey*, 41 *Id.* 389; *Illinois Cent. Rd. Co. v. Grabill*, 50 *Ill.* 241; *Elizabethtown, &c., Co. v. Combs*, 10 *Bush* 382; *Jeffersonville, &c., Co. v. Estelle*, 13 *Id.* 667, illustrate and enforce the principles we are discussing. In *Fowle v. New Haven, &c., Co.*, 112 *Mass.* 334, language is used which so forcibly applies here that we quote it: "The case at bar," said the court, "is not to be treated strictly in this respect as an action for an abatable nuisance. More accurately, it is an action against the defendant for the construction of a public work under its charter in such a manner as to cause unnecessary damage by want of proper care and skill in its construction. For such an injury the remedy is at common law. And if it results from a cause which is permanent in its character, or which is treated as

permanent by the parties, it is proper that entire damages should be assessed with reference to past and probable future injury."

As probable future damages may be taken into consideration in an action to recover for a loss caused by the negligence of corporate officers in constructing a public work of a permanent character, the plaintiff in such an action can recover all the damages he has sustained, and in all such cases no second action can be maintained. To permit a second action to recover damages resulting from the negligent grading of a street, would be to allow successive damages to be awarded where there was no fresh wrong. Great injustice would almost inevitably result from a rule permitting successive actions, for it would be impossible to prevent damages from being twice assessed for the same wrong.

The ultimate conclusions to which these authorities lead are: *First.* That where there is one cause of action all the damages must be recovered in one suit, and for fresh damages resulting from the original wrong a second action cannot be maintained. *Second.* Where the cause of action is the negligence and unskilfulness of the officers of a municipal corporation in the improvement of a street, the injury is complete and permanent, constituting but one cause of action; and in a suit on that cause of action all damages, present and prospective, may be recovered, and for fresh damages resulting from the improvement a second action will not lie.

The complaint of the appellee, as we have seen, is based upon the negligence of the corporate officers in improving a street and the improvement is a permanent one, so that the tort which formed the basis of the action was complete when damages resulted.

The answer avers, and the demurrer admits, that there was no new wrong or negligence. As the pleadings stand, there is a single wrong, and nothing more. The fresh damages do not, as the pleadings aver, arise from a new or fresh wrong. The case, therefore, is not within the authorities which hold that where there is a new neglect or a fresh wrong there may be a second action.

The answer avers that the injury complained of is the same as that declared on in the former action. It goes even further, for it affirmatively shows that no improvement has been made, and that no grading has been done since that described in the former complaint. The causes of action are therefore the same. Where the answer avers the causes of action to be the same, and the record does not show them to be different, the averment is taken to be true

on demurrer: *Cutler v. Cox*, 2 Blackf. 178. If the causes of action are not the same, that fact must be replied: *James v. State*, 7 Blackf. 326.

We have upon the pleadings, therefore, a case where there are fresh damages, but where there is no fresh cause of action; for the utmost that can be yielded to the appellee is that the record shows that damages have resulted since the first action, flowing, however, from the original wrong. We need not decide what might be successfully replied; we simply decide the question before us, and our decision is, that the answer sufficiently pleads a former adjudication.

We have already placed stress upon the fact that the construction of the highway is permanent, and that the wrong was complete when the street, as a permanent work, was finished and damages resulted. We deem it proper to emphasize this element of the case, for we can readily conceive cases of an essentially different character where a very different rule would apply. We can conceive of cases where a temporary wrong might be done under such circumstances as would make it reasonable to presume that the defendant would right the wrong before a recurrence of harm or loss, and in such cases it might well be that the plaintiff could bring a second action. We know that there are cases where it is proper to presume that the wrongdoer will not maintain the unlawful thing that caused the harm or loss: *Mayne Dam.* 141, § 110.

But the case upon which we are pronouncing judgment, and to which we confine our decision, is one where the improvement of the street was a complete and permanent fact, and where the parties must presume that it was permanent in its character, and that it was intended that the thing done should remain unchanged. It cannot be presumed that municipal officers, having built a street or road, intended it to be temporary. A presumption that the wrong was not of a permanent character might, perhaps, obtain where a natural watercourse is temporarily obstructed, or where, in the course of improving a street, water was thrown upon a lot; but it cannot prevail where the improvement of the street is complete and the street permanently constructed. This is not the case of a nuisance. It is the case of a negligent improvement of a street. The improvement was in itself rightful and legal but the manner in which the improvement was made was wrongful. The wrong was not in grading the street, but in the manner of doing it. It is

not a nuisance for a municipal corporation to grade its streets, but it is an actionable wrong to do it negligently. The wrong in negligently grading the street is the basis of the action, for there are no facts alleged constituting a nuisance. It is not a nuisance to do what the law authorizes, but it may be a tort to do the authorized act in a negligent manner. It is evident, therefore, that the cases which hold that the continuance of a nuisance will supply ground for an action have no influence upon this case.

Judgment reversed.

1. The authorities are so fully cited upon the first branch of the principal case, that any further citations upon the well-settled principles there announced would be useless. All the cases agree upon them, and it is only in this application that differences arise. We proceed to a consideration of the second branch of the case.

2. It is elementary that there can be no recovery of damages sustained, unless there was an injury which caused the damages sought to be recovered, or from which the damage directly or proximately flowed. Before the complaining party can recover he must show an injury done to him, either to his person, property or rights; and then the law will recompense him by compelling the party in the wrong to pay him a sum of money, supposed to be commensurate with his loss. The word "injury" for which damages are allowed is such an one as the law recognises, a "legal injury;" and a right to recover damages is a "legal right." Wherever it is said there is no "right" without a remedy, a "right," such as the law recognises, is meant; for there are many rights for the deprivation of which the law gives no remedy: Cooley on Torts 19.

In the nature of things, as well as in law, damage and injury are inseparable: without a damage there is no injury, and an injury necessarily draws with it a damage. Yet there are, in many instances, damages suffered as to which in law the fiction is adopted that they arise

without an injury, or are *damnum absque injuria*. For these no action lies: Broom Max. 195; *Hall v. Mayor of Bristol*, L. R., 2 C. P. 322; *Smith v. Thackeray*, L. R., 1 C. P. 564; 1 Smith L. C. 361.

From this rule that every damage for which a recovery is allowed, has its corresponding injury, arises another rule that for every new or fresh damage sustained, there must be a corresponding new and fresh injury; and if there has been a recovery had for the injury inflicted, a second recovery for a new and fresh damage sustained since judgment pronounced cannot be had, because there is no corresponding injury. If the fresh damage accrued before trial had, evidence of it may be given so that the jury may more accurately measure the quantum of damages to be awarded: *Filer v. N. Y. Cent. Rd. Co.*, 49 N. Y. 42; *Hagan v. Riley*, 13 Gray 515; *Hayden v. Albee*, 20 Minn. 159; *Fort v. Union P. Rd. Co.*, 2 Dill. 259; *Hagan v. Riley*, 13 Gray 515. But where a judgment intervenes between the injury and the subsequent development of fresh damages, no cause of action can be maintained on account of these damages. Two reasons are assigned for this: First, there is no fresh injury, and the injured party has already recovered for the injury inflicted; second, the injury being permanent, or of some duration, the jury were authorized to award prospective, as well as past damages, and it is conclusively presumed that they did award both classes of

damages: *Weisenberg v. City of Appleton*, 26 Wis. 56; *Town of Elkhart v. Ritter*, 66 Ind. 136; *City of Indianapolis v. Gaston*, 58 Id. 224; *Miller v. Wilson*, 24 Penn. St. 114; *Howell v. Young*, 5 B. & C. 259.

But if the fresh damages arose from new injuries, perpetrated after the commencement of the action, then evidence of such fresh damages cannot be given; for a new action must be brought to recover them: *Hicks v. Herring*, 17 Cal. 566; *Troy v. Cheshire Rd. Co.*, 23 N. H. 102; *Phillips v. Terry*, 3 Keyes 313; *Robinson v. Bland*, 2 Burr. 1086.

That no action can be maintained for damages developed after verdict, and of which both the plaintiff and defendant were ignorant, and which could not be foretold by human science or ingenuity, is certainly a harsh rule, and one not calculated to inspire the moralist with a profound admiration of the law. It is true that the maxim *interest reipublice ut sit finis litium* (Broom's Max. 331), is here insisted upon; but maxims often work an injury rather than afford a redress for grievances. Thus, where money was paid, and a receipt taken which was lost, and the payer was by suit compelled to pay a second time; and afterwards finding the receipt, the payer brought suit for the money had and received, as to the last amount paid, it was held that no recovery could be had, and the doctrine of the maxim quoted was invoked to prevent a recovery: *Marriot v. Hampton*, 7 T. R. 269; see *Follett v. Hoppe*, 5 C. B. 238; *Smith v. Monteith*, 13 M. & W. 427; *Homlet v. Richardson*, 9 Bing. 644. Modern legislation has often afforded relief in such instances, by providing for a new trial on account of newly discovered evidence.

The harshness of the rule insisted upon and applied in the principal case, evidently led the English court in *Mitchell v. Darley Main Colliery Co.*, 24 Am. Law Reg. (N. S.) 432, and note, to parry its thrust and raise a distinction in

the cases, largely, if not in fact artificial. In the principal case it was the subsequent flooding that caused the damages; in the English case it was the subsequent subsidence that caused them. In the latter case it was held that there was a continuing duty imposed by law upon the defendant to keep the walls and roof of the mine propped, so that there would not be a fresh subsidence. Why was there not a continuing duty devolving upon the city to keep her streets—her property—in such a condition, that it would not cause a new damage? Damages had been allowed because the grading of the street had cast water upon the plaintiff's lot; and the subsequent suit was for a damage identical in its results. If suit had been brought before any damage was suffered, no verdict for the plaintiff, no doubt, could have been given. It is argued that the street improvement was permanent, and that such damage must, in the nature of things, again occur; and therefore the jury have awarded prospective damages. The same argument is applicable to the colliery case. In neither instance could the jury anticipate all the damages that would afterwards arise. If the plaintiff should wait a long time until he was sure he could lay before the jury evidence of all the damages he had sustained, he would probably be met with the plea of the statute of limitations: *Woodsworth v. Harley*, 1 B. & Ad. 391; *Roberts v. Read*, 16 East 215.

The case of *Brunsdon v. Humphrey*, 24 Am. Law Reg. (N. S.) 369, and note, goes a step farther than the colliery case. The plaintiff's van was injured by the defendant's van, and he recovered damages therefor. Afterwards he sued for damages to his person, caused by some collision, and was allowed to recover. Lord COLERIDGE dissented, saying, "It seems to me a subtlety not warranted by law, to hold that a man cannot bring two actions, if he is injured in his arm and in his leg, but can bring two

actions, if besides his arm and leg being injured, his trousers, which contain his leg, and his coat-sleeve, which contains his arm, have been torn." Suppose the injured person had borrowed the trousers and coat, could not the owner have maintained an action for the injury to them, and the injured person for his personal injuries? Undoubtedly; and if two actions could thus be maintained by different persons, why not allow one person to bring them?

The doctrine of these two cases will, no doubt, find its place in our jurisprudence, although courts may not be willing to recognise it under the name it is here known; just as they constantly reiterate that a new trial will not be granted for impeaching or cumulative evidence, and yet seek to distinguish the newly discovered evidence produced from that charge in order that justice may be done.

But how are the cases? For an injury to his person by reason of a defective sidewalk, the plaintiff has but one action; in it he recovers past and prospective damages: *Leroy v. Springfield*, 81 Ill. 114; see *Crawford v. Gauden*, 33 Ga. 173. And the same is true of injuries received in a railroad accident; and if the person does not recover for a long time, and delays suit until he can ascertain the amount of his damages, until the period of the statute of limitation has run from the time of the injury, his right of action will be barred: *Piller v. Southern Pacific Rd. Co.*, 52 Cal. 42; *Gustin v. Jefferson*, 15 Ia. 158.

So where an attorney-at-law neglected to prosecute a claim until it became barred at law, and he was neither guilty of fraud or concealment, it was held, in an action against him for damages, alleging special consequential damages, that the statute began to run in his favor, from the time of the breach of duty, although the special damages were not made definite or revealed until later: *Moore v. Juvenal*, 92 Penn. St. 484; s. c. 39 Am.

Rep. 795; see also *Wilcox v. Plummer*, 4 Pet. 172; *Rhines v. Evans*, 66 Penn. St. 192; s. c. 5 Am. Rep. 364. And that the plaintiff may recover prospective damages, and can have only one action where only one injury is inflicted: see *Donaldson v. Mississippi, &c., Rd. Co.*, 18 Ia. 280; *Walker v. Erie Rd. Co.*, 63 Barb. 260; *Penn. Rd. Co. v. Books*, 57 Penn. 339; *Aaron v. Secoud Avenue Rd. Co.*, 2 Daly 127; *Drew v. Sixth Avenue Rd. Co.*, 26 N. Y. 49; *Filer v. N. Y. Cent. Rd. Co.*, 49 Id. 42; *Holyoke v. Grand Trunk Rd. Co.*, 48 N. H. 541; *Black v. Carrollton Rd. Co.*, 10 La. Ann. 33; *Frink v. Schroyer*, 18 Ill. 416; *Matteson v. N. Y., &c., Rd. Co.*, 62 Barb. 364; *Klein v. Jewett*, 26 N. J. Eq. 474; *Caldwell v. Murphy*, 1 Duer 233; *Memphis, &c., Rd. Co. v. Whitfield*, 44 Miss. 466; *Curtis v. Rochester, &c., Rd. Co.*, 18 N. Y. 534.

Where a father brought suit for an injury to his child, and the suit was limited to the injury up to the time of bringing the action, it was held that a second suit for loss of service, arising by reason of injurious effects of the first injury, after the suit, could not be maintained: *Whitney v. Clarendon*, 18 Vt. 252; see *Waller v. Chicago*, 11 Ill. App. 309.

When property is taken for public use, or by a railroad or other corporation, the damages assessed must include future or prospective damage; and no second action can be brought, or writ of assessment obtained for damages afterwards sustained: *Perley v. B. C. & M. Rd. Co.*, 57 N. H. 212; *Waterman v. Connecticut Rd. Co.*, 30 Vt. 610; *Water Co. v. Chambers*, 13 N. J. Eq. 199; *Van Schoick v. Delaware Canal*, 20 N. J. L. 249; *Fowle v. New Haven Co.*, 112 Mass. 334; *Fowle v. N. H., &c., Rd. Co.*, 107 Id. 352; *Aldrich v. Cheshire Rd. Co.*, 21 N. H. 359; *Sawyer v. Keene*, 47 Id. 173; *Chesapeake Canal v. Groves*, 11 Gill & J. 393; *Call v. Middlesex*, 2 Gray 232; *Baker v. Johnson*, 2 Hill 342; *Evans v. Haefner*, 29 Mo. 141;

Montmorency G. Rd. Co. v. Stockton, 43 Ind. 328; *La Fayette Rd. Co. v. New Albany*, 13 Id. 90; *Missouri Rd. Co. v. Haines*, 10 Kan. 439; *Baltimore Rd. Co. v. Magruder*, 34 Md. 79; *Furniss v. Hudson Rd. Co.*, 5 Sandf. 551.

So an assessment for damages for land taken to widen a road, includes all damages occasioned by reducing the land so taken to the grade of such road, and consequently, where the grade of such road was subsequently changed, the damage occasioned by such change were held not to include any but such as arose by the alteration of the road in its entire width from the old established grade to the new grade: *Van Riper v. Essex Public Board*, 9 Vroom 23.

But in the case of a continuing nuisance, a recovery is allowed up to the date of the writ; and for its continuance after that time, a new action lies; for every continuance of the nuisance is a new nuisance: *Cole v. Sproul*, 35 Me. 161; *Vedder v. Vedder*, 1 Denio 257; *Bare v. Hoffman*, 79 Penn. St. 71; *Savannah, &c., Rd. Co. v. Bourquin*, 51 Ga. 378; *Slight v. Gutzaiff*, 35 Wis. 675; *Queen v. Waterhouse*, L. R., 7 Q. B. 545; *Thayer v. Brooks*, 17 Ohio 489; *Anderson, &c., Rd. Co. v. Kernodle*, 65 Md. 314; *Hopkins v. Western Pacific Rd. Co.*, 50 Cal. 190; *Freundstein v. Heine*, 6 Mo. App. 287; *Allen v. Worthy*, L. R., 5 Q. B. 163; *Bradley v. Amis*, 2 Hayw. 399. It is otherwise if the wrongful act produces an injury which is not only immediate, but from its nature must necessarily continue

to produce loss independent of any subsequent wrongful act; then all the damage resulting, both before and after the commencement of the suit, may be estimated and recovered in one action: *Cooper v. Randall*, 59 Ill. 321; *Hayden v. Albee*, 20 Minn. 159; *Adams v. Hastings, &c., Rd. Co.*, 18 Id. 265; *Troy v. Cheshire Rd. Co.*, 23 N. H. 102; *O'Riley v. McChesney*, 3 Scam. 278; affirmed, 49 N. Y. 672; *Seely v. Alden*, 61 Penn. St. 302; *Cumberland, &c., Co. v. Hitchings*, 65 Me. 140; *Elizabethtown, &c., Rd. Co. v. Combs*, 10 Bush 382; see *Cadle v. Muscatine, &c., Rd. Co.*, 44 Ia. 11; *Simpson v. Keokuk*, 34 Id. 568.

In an action for enticing away an apprentice, damage does not include the loss of services for the residue of his term to come after the trial, for the apprentice may return: *Hambleton v. Veere*, 2 Saund. 170; *Moore v. Love*, 3 Jones L. 215; *Trigg v. Northcut*, Litt. Sel. Cas. 414; *Hodsoll v. Stellebrase*, 11 A. & E. 301; *Lewis v. Paachey*, 1 H. & C. 518; see *McKuy v. Bryson*, 5 Ired. L. 216. And this is true even though the apprentice enlist in the public service, or in the army or navy: *Covert v. Gray*, 34 How. Pr. 450.

And where the defendant enticed away the plaintiff's wife, it was held that recovery would be had only up to the time of bringing the action; for the detention after that time a new action could be maintained: *Brasfield v. Lee*, 1 Ld. Raym. 329.

W. W. THORNTON.

Crawfordsville.

Supreme Court of Missouri.

BENT, RECEIVER ST. LOUIS MUTUAL INS. CO., v. PRIEST.

Where a director receives property as an inducement of and consideration for his vote and influence in a proposed contract with the corporation, he is a trustee of such property, and it may be recovered from him in a suit by a receiver of the corporation.

In constructive trusts arising from fraud, if the facts constituting the fraud are open, the statute of limitations commences to run at once ; but if the facts are secret the statute does not commence to run until their discovery.

The fact that a suit is being prosecuted under a champertous agreement between plaintiff and his counsel is no defence to the suit. Such irregularity can only be set up when it is sought to enforce the champertous agreement.

The opinion of the court was delivered by

BLACK, J.—In 1873 the superintendent of insurance began proceedings to wind up the St. Louis Mutual Life Ins. Co., which was not then in a satisfactory condition. Most of the directors regarded a reinsurance as the best way out of the difficulty. Efforts were made to that end, including negotiations with the Mound City Life Ins. Co. Charles H. Peck, who was a large stockholder in the St. Louis Mutual, but not a director or officer, made proposals to some of the officers of the Mound City to bring about such an arrangement, the result of which was a contract between Peck and the president of that company, dated 27th November 1873, by which, after reciting the desire of that company to effect the reinsurance, and the deemed necessity of Peck's services to accomplish that object, the company agreed to pay him \$155,000 within sixty days, for which sum Peck was to "devote his services for the procurement of such reinsurance and effecting a contract between said companies. Peck thereupon approached the defendant, a director of the St. Louis Mutual, who at first did not take much interest in the matter. Peck then in substance stated that he was largely interested in having the reinsurance effected ; that it was worth ten or fifteen thousand dollars to the stockholders of St. Louis Mutual, and that he meant business.

Priest and Wyman were partners in the real estate business, and upon Peck's suggestion that his business was legitimately within the partnership business, Priest referred Peck to Wyman, who was at a desk in the same room or office. The result of the negotiation between Peck and Wyman was that the former placed bonds of the L. & N. Railroad Co., of the par value of \$15,000, in the hands of Mullikin to be handed to Wyman if the reinsurance was effected, otherwise they were to be returned to Peck. This agreement was in writing, but was subsequently destroyed. The evidence, including a letter from Peck, shows that he agreed within thirty days to substitute money, or bonds of the Vulcan Iron Co. or St. Louis Gas Co. for these railroad bonds, the latter it is said then being worth but sixty cents on the dollar.

As the Mound City Ins. Co. then stood the superintendent of insurance did not regard it strong enough to make the reinsurance and it was required to add a half million dollars to its capital stock. In December 1873, a contract of reinsurance was made by the St. Louis Mutual with the Mound City, the latter also stipulating that for a transfer of all of the assets of the St. Louis Mutual, it would assume all the liabilities of that company, increase its own stock a half a million dollars, and out of this increased stock exchange its own stock for that of the St. Louis Mutual.

Of the twenty directors of the St. Louis Mutual, seventeen, including the defendant, voted for the measure.

The Mound City increased its stock as agreed, the reinsurance was approved by the superintendent of insurance and by the court in which the proceedings against the Mound City were pending, and those proceedings were dismissed.

By the 17th Jan. 1874 the whole contract was substantially completed, Peck received his agreed compensation from the Mound City Ins. Co. in secured notes, which that company acquired by the assignment from the St. Louis Mutual, Peck would not, at least did not, substitute money or bonds of the Iron Co. or Gas Co. as he had agreed for the railroad bonds in the hands of Mullikin, and Wyman, unable to do better, took those bonds.

In August 1874, Priest and Wyman dissolved their partnership, at which time Wyman handed over to Priest the one-half of the railroad bonds.

The conclusion from all the evidence is irresistible that defendant agreed to and did advocate and vote for the assignment and reinsurance, in consideration of the arrangement between Peck and Wyman. At all events the bonds were given to secure defendant's active influence in favor of the measure, though without this he might not have been hostile to the transaction.

In 1877 the superintendent of insurance commenced new proceedings against the St. Louis Mut. Life Ins. Co., and plaintiff was appointed receiver. By this suit he seeks to charge the defendant as a trustee of all the railroad bonds. The Circuit Court so held and decreed as to the one-half received by the defendant, and on his refusal to produce the same, entered a money judgment for the estimated value.

From this judgment the defendant appealed. Plaintiff took a writ of error. In like manner both parties come to this court from

the Court of Appeals, where the judgment of the Circuit Court was affirmed.

An agent or trustee cannot unite in himself the opposite character of buyer and seller, and if he does the profits may be charged with a trust for the benefit of the principal, unless the latter confirm the transaction with *full* knowledge of all of the facts. So too if the agent make gains from the use of the trust funds or property he must account therefor. We need not cite authorities from this and other courts to support these plain propositions. Again, if the agent accepts any benefits in conducting the business of his principal he will hold them in trust for the principal: Story on Agency, sect. 211 (8th ed.); Perry on Trusts, sect. 206; *Jacobus v. Mason*, 37 N. J. Eq. 48.

The directors of a corporation occupy a fiduciary position. They are trustees and agents of the corporation and stockholders. In general they are governed by the same rules as are applied to trustees and agents. *Parker v. Nickerson*, 112 Mass. 195; *Ry. Co. v. Poor*, 59 Me. 277; *Ry. Co. v. Hudson*, 19 Eng. L. & Eq. 365. In Perry on Trusts, at sect. 207, it is said: "And so all advantages, all purchases, all sales, and all sums of money received by directors in dealing with the property of the corporation, are made and received by them as trustees of the corporation, and they must account for all such moneys or advantages received by them by reason of their position as trustees." Defendant does not seriously controvert these general principles of equity jurisprudence, but he insists they have no rightful application to this case, because the bonds were never a part of the assets of the St. Louis Mutual, did not constitute a part of the consideration, avowed or concealed, paid by the Mound City, and were not made by him in the legitimate business of the corporation.

He relies with full confidence upon *Tyrrell v. Bank of London*, 10 H. L. C. 26. The substantial facts of that case were these: The bank had been recently organized, and Tyrrell was its solicitor. Mrs. Campbell owned certain property upon a part of which was situated a building known as the Hall of Commerce. Read had a contract with her for the purchase of the whole property at 49,200*l*. Tyrrell and Read formed a combination to sell the property to the bank at an advance price, and Tyrrell, for his influence, was to have a one-half interest in the contract which Read had with Mrs Campbell. Tyrrell kept the agreement secret from the bank, at the same

time urged the bank to purchase, professing to act for it as solicitor. Eventually the bank purchased the Hall of Commerce part of the property at 65,000*l*. Out of this Mrs. Campbell was paid, some litigated claims were settled, and the balance was paid to Read, who divided the profits with Tyrrell, each making some 6000*l*., and had left also the unsold portion of the property, alleged to be of the value of 8000*l*.

The suit was brought by the bank against Tyrrell and Read. The Master of the Rolls dismissed the bill as to Read and decreed Tyrrell a trustee for the bank of all interests acquired in the property. Accounts were directed to be taken, and Tyrrell was ordered to convey to the bank his share in the property not sold to the bank. On appeal prosecuted by Tyrrell, the decree was modified in form. The Lords considered that Tyrrell could not be decreed a trustee of the unsold portion of the property, and should not have been directed to convey that to the bank, because as was said, the limit of the agency of Tyrrell, the extent of his obligation and the relation of solicitor and client, were to be ascertained by the extent of the property sold by Tyrrell to the bank. The Lord Chancellor very clearly states that Tyrrell could only be a trustee as to that portion of the property sold to the bank, and as to that he should make no gain. He proceeds to say the object which the Master of the Rolls had in view is to be accomplished in another way: "Tyrrell must receive from his clients, in his character of vendor to his clients, only that sum of money which, as between him and Read, Tyrrell must be taken to have paid for the property conveyed to his clients; but that sum of money must be ascertained in the following way: By deducting from it the value of the unsold property included in the contract between Read and Tyrrell, but not included in the contract of sale to the clients."

The bank among other things contended, that assuming Tyrrell's agency as to the bank was confined to the Hall of Commerce part of the property, still the circumstances showed that he received the share in the rest as a bribe, and for that reason the bank was entitled to a conveyance of it. As to this contention, Lord CHELMSFORD said: "No authority has been adduced in support of such a proposition, and I do not think it can be maintained. In order to simplify the question, let it be supposed that Tyrrell had acquired no interest in the property, but that Read had offered him 5000*l*. to induce the respondent to purchase, and that they had been persuaded

by Tyrrell to buy at an excessive price. Of course they might have rescinded the contract, but could they in any manner have obtained the 5000*l.* on the ground that it belonged to them? If by reason of the agreement between Read and Tyrrell, the respondent had been prevailed upon to give too large a sum for the property, they might have maintained an action on the case against both parties to the imposition upon them, and have recovered damages; or they might have sued their agent, Tyrrell, for damages arising from the breach of duty, and they would probably have received an amount equal to the sum which he had improperly received as a fair measure of the injury which they had sustained. But the 5000*l.* itself, as a specific demand, they could in no manner have recovered. The unsold part of the property in the same manner cannot be directly reached by any proceeding of the respondent." These remarks of Lord CHELMSFORD, if detached from the facts of that case and the decree actually made, appear to give some support to the defendants' position here.

The solicitor could be regarded as the agent of the bank only so far as the bank became the purchaser; beyond that he had a right to deal for himself; yet the decree as modified did not allow him to make any gain out of the transaction taken as a whole. He was allowed to keep the unsold portion, but its value was deducted from the amount which he was allowed to receive from the clients in the statement of the account. Practically there was little if any difference between the decree as made by the Master of the Rolls and as modified, in its effect upon the parties; and this seems to have been conceded in terms by Lord CRANWORTH. The facts there in judgment and the decree even as modified, do not furnish a precedent in defendant's favor.

Where a trustee retired from his office in consideration that his successor paid him a sum of money, it was held that the money so paid should be treated as a part of the trust estate, and be accounted for as such by the retiring trustee, on the ground that he could make no profit, directly or indirectly, from the trust property or from his office of trustee: *Sugden v. Crossland*, 8 Smale & Gif. 192.

In *Gaskell v. Chambers*, 26 Beav. 360, it appears the Eagle Ins. Co. desired to buy out the business of the London Mutual Ins. Co., and agreed to and did pay a specific consideration therefor, and by a secret agreement with the directors agreed to and did pay to them

the further sum of four thousand pounds as a compensation for the loss of their offices. These directors were held to be trustees for the corporation; and it was also ruled that they received that sum by reason of their position as trustees, and must account therefor.

These cases are all quite clear to the effect that the trustee will not be allowed to make gain to himself beyond his allowed compensation, by reason of his office and influence as such trustee. By accepting the office the director undertakes to give his judgment and influence to the interests of the corporation in all matters in which he represents or professes to represent it. That judgment and influence of right belongs to the corporation, and so does that which it produces; and the bonds received by the director are its property, as between it and the defendant. The circumstance that they came from Peck, and not directly from the Mound City Ins. Co., is wholly immaterial. They came from the agent of that company, and the extravagant amount paid Peck impresses one with the notion that more than fair commissions were included in the \$155,000. However that may be, what the director makes in his office as such, belongs to the corporation. It will not do to clog these principles of law applied to principal and agent, trustee and *cestui que trust*, with exceptions and modifications. They must not be whittled away. Whatever may be the practice in such cases, the agreement by which the bonds were acquired was an illegal contract, as well as a plain breach of duty. No court, it is true, would aid the defendant or the receiver, or the corporation of which he is the receiver, in recovering the bonds from Peck, for that would be to execute the illegal contract. Neither would a court assist Peck in recovering them back after the transaction was completed. So, too, an agent may resist an accounting on the ground that the subject of the agency was illegal or against public policy: *Story on Agency*, sect. 235. But when the subject of the agency is entirely legal, and that was the case here, and profits are made by a violation of duty, it would be obviously unjust to allow the agent to reap the fruits of his own misconduct: *Id.*, sect. 207. An agent is accountable to his principal for moneys that came into his hands as such, even if such amount be composed of usurious interest, and not collectable by the principal himself: *Chinn v. Chinn*, 22 La. Ann. 599. One party cannot hold back proceeds from another of whom he was representative, on the ground that

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there was illegality in the way of getting the money: Whart. on Contr. sect. 354. The defendant acquired the bonds while acting and professing to act in his capacity of director, and must be held to have received them in that capacity. The plaintiff's case is made out by the proof of these facts, and we are not concerned in the execution of the illegal agreement.

As to the writ of error prosecuted by the receiver, we do not see that he has any right to the bonds which never came to the defendant. Wyman, who acquired them, is no party to this suit, held no fiduciary relation to the plaintiff's corporation. The receiver has elected to take the course here pursued, and must be content with such property as it will reach.

This suit was begun 19th February 1879, five years and ten to fifteen days after Wyman received the bonds for himself and defendant. The agreement by which the bonds were acquired, and the receipt of the same are facts which were kept secret from all persons save those directly connected therewith, until 1878. Rumors were then afloat pointing to these facts. They were then brought to the attention of the court, soon thereafter this suit was begun, defendant pleaded the five years statute of limitations, and plaintiff replied that the fraud was not discovered until within five years next before the commencement of the suit.

Sect. 3230, R. S., specifies five different classes of civil actions, (other than those for the recovery of real estate), which can only be commenced within five years after the cause of action shall have accrued. The fifth is, "an action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud."

Our statute of limitations applies to equitable, as well as legal causes of action, and we agree with counsel for the defendant that this clause under consideration, should be considered in the light of the former equity rules, the place of which, in many respects at least, it was designed to take. Beyond doubt the statute does not now, and never did run against an express continuing trust in favor of the trustee; certainly not until he openly repudiates the trust: *Johnson v. Smith*, 27 Mo. 591; *Smith v. Recards*, 52 Id. 581; 56 Id. 553. Conceded it must be, that by the equity rules the statute was not applied by way of analogy in cases of actual fraud until the discovery of the fraud. But is it true, as is contended

here, that by those rules the statute was applied without regard to the time of discovery in case of constructive frauds and trusts?

It was said by SCOTT, J., in *Keeton's Heirs v. Keeton's Adm'r*, 20 Mo. 541, "In cases of resulting implied and constructive trusts, where a party is to be constituted a trustee by a decree of a court of equity, founded on fraud, it is well settled as a rule of equity, that the statute of limitations and presumptions from lapse of time, will operate. With regard to the statute of limitations, it will run from the time that the facts are brought home to the knowledge of the party." See also Perry on Trusts, sects. 228 and 230; 1 Dan. Ch. Plead. 669; *Hunter v. Hunter*, 50 Mo. 445; Angell on Lim., sect. 470. In the case last cited the defendants were the uncles and agents of the plaintiffs for the management and sale of their lands; they purchased the lands, with the value of which the plaintiffs were not familiar, at an under value; they then sold the same at an advanced price. It was a suit to establish a constructive trust for the profits arising from the re-sale. It was there said: "If a party is in possession of, or has notice of, the main facts constituting the fraud, the statute will commence running from that time." The difference of opinion expressed in that case and the subsequent one of *Rogers v. Brown*, 61 Mo. 187, is not pertinent to any inquiry here, for this case in no way concerns real estate.

Many authorities do hold that in cases of constructive trusts and frauds, the statute will begin to run without regard to the time of the discovery. This appears to be due to the fact that often in such cases the facts are open, and the law frequently draws its conclusion without regard to the motives, because of the confidential relation of the parties. Much we think depends upon the fact whether the fraud is a secret or open one. If the substantial facts constituting the fraud in cases like the one under consideration were open, it is believed under the equity rules the statute of limitations would have been applied at once; but if the facts were in their nature secret and were unknown, it is believed the statute would not begin to run until they were discovered, there being no want of diligence on the part of the complainant. Here the fraud consists in professing to act for and in the interest of the corporation, as was defendant's duty, when in reality he was acting for himself and for his private gain. The agreement under which this was done was in its very nature a secret one, one which the

corporation would not naturally suspect, and one which would not be revealed by any act openly done. Of course here, simple knowledge of the existence of the agreement and acquisition of the bonds thereunder, brought home to the plaintiff or the corporation of which he is receiver, would start the statute, and from that time it would continue to run, notwithstanding the subsequent appointment of the receiver. This knowledge was not acquired until much more than fifteen days after the receipt of the bonds by Wyman. The circumstances by which the transaction was discovered show there was no laches on the part of the plaintiff or his corporation.

We conclude the clause of the statute before noted applies to this case, and under it the cause of action is not barred.

A contract founded on a champertous consideration is illegal, against public policy and void: *Duke v. Harper*, 66 Mo. 55. In that case the contract, there in question, was held not to be champertous because the attorneys did not bind themselves to pay any portion of the expenses of the litigation.

Where the right of the plaintiff, which he seeks to enforce, is derived under a title founded on his champerty, the suit must fail. Courts are not organized for the purpose of enforcing such contracts. Many of the authorities cited by defendant go to this extent and no farther, some of them do appear to hold that where there is a champertous contract by which the suit is prosecuted, and that fact comes to the knowledge of the court, it should dismiss the suit: *Barber v. Barber*, 14 Wis. 143; *Webb v. Armstrong*, 5 Humph. 381. Others appear to give a qualified approval to the doctrine. On the other hand a number of cases hold that the fact that the suit is being prosecuted under a champertous contract is no defence, and that the illegality of such a contract can only be set up when it is sought to enforce the contract: *Hilton v. Woods*, L. R., 4 Eq. Cas. 432; *Whitney v. Kirtland*, 27 N. J. Eq. 333; *Allison v. Rd. Co.*, 42 Iowa 274; *Courtright v. Burns*, 3 McCrary 60. Unless the plaintiff's title by which he seeks to enforce a right is infected by a champertous contract, we see no reason why the suit may not proceed, though such a contract may exist as between the plaintiff and his attorney. It is time enough to turn a party out of court when he asks the aid of a court to enforce such a contract. This is in substance the rule as to most illegal contracts, and there is no good reason at this day for making an exception in this class of contracts.

Certain policy holders brought to light the facts upon which this suit is founded, and were permitted by the court to prosecute the same in the name of the receiver upon indemnifying him, and as a consequence the funds in his hands, against the payment of costs. These policy holders were but protecting their own rights. They could not well sue in their own names. In such cases it is not an uncommon thing for cautious courts to require that the officer be made safe against costs of long and tedious suits. Thus far there is no element of champerty in the defence. It would seem the defendant offered to prove that the attorney by whom the suit was instituted and who represented these policy holders gave the bond, and further that he had an agreement with the receiver by which he was to have a certain portion of the avails of the suit for his services. In view of this offer let it be conceded for the purposes of this case without deciding the question that the agreement between the attorney and the receiver was champertous, still applying the principle before announced, that constituted no defence to this action. The receiver's account will come before the court for its approval, and it will be time enough then to examine into the question of the validity of the agreement. The plaintiff's title is in no wise affected by the illegal agreement even if any there was. We do not think public policy requires the courts to turn aside and investigate such side issues. The judgment in this case, from which both parties came to this court, is affirmed.

HENRY, C. J., dissents. The other judges concur.

Fiduciary Character of Directors to the Corporation and Duties springing from such Relations.—The relation of directors and officers to the corporation is fiduciary; they are trustees and agents of the corporation and stockholders; they occupy a position of the highest trust and confidence; and the utmost good faith is required in the exercise of the powers conferred upon them: Green's *Brice's Ultra Vires* 477, 478, n. a; Morawetz on *Priv. Corp.*, sect. 243, and cases; *Hoyle v. Plattsburgh, &c., Rd.*, 54 N. Y. 314, 328; *Cumberland Coal Co. v. Sherman*, 30 Barb. 533, 559, 577; 3 *Pomeroy's Eq. Jur.*, sects. 1068-1090; *Woods' Field's Corp.*, 2d ed., sects. 154, 155; *Ewell's Evans's*

Agency *276 *et seq.*, sect. 4; *Pierce on Railroads* 45, and cases; *Pearson v. Concord Rd. Co.*, (N. H. S. C.), 16 Rep. 463, and cases; *European Rd. Co. v. Poor*, 59 Me. 277; *Butt v. Wood*, 38 Barb. 188; *York, &c., Rd. v. Hudson*, 16 Beav. 499; *Hule v. Bridge Co.*, 8 Kan. 466; *Port v. Russell*, 36 Ind. 60; *Bank v. Downey*, 53 Cal. 463; *Corbett v. Woodward*, 5 Saw. C. C. 403. "Whether a director of a corporation is to be called a trustee or not in the strict sense of the word, there can be no doubt that his character is fiduciary, being entrusted by others with powers which are to be exercised for the common and general interests of the corporation :'' *Hoyle v. Plattsburgh, &c., Rd.*, *supra*.

"The relation between directors of a corporation and its stockholders is that of trustee and *cestui que trust*:" *Butt v. Wood*, *supra*. Theirs is an office of trust. "Persons who become directors of a corporation, place themselves in the situation of trustees, and the relation of trustee and *cestui que trust* is thereby created between them and the stockholders:" per ROMILLY, M. R., in *The York & Midland Rd. v. Hudson*, 16 Beav. 99. They must be held as occupying a fiduciary relation to the stockholders, for and in behalf of whom they act:" per APPLETON, C. J., in *European, &c., Rd. v. Poor*, 59 Maine 277. They are in regard to all matters entered into in behalf of the stockholders to be treated as agents: *Luxembourg Rd. v. Magnay*, 25 Beav. 586.

And as trustees and agents of the corporation and of the stockholders, they are subject to the strict rules which govern the relations of trustee and *cestui que trust*, in all their dealings as directors of the corporation: *Wardell v. Railroad*, 103 U. S. 657, 658, and cases; s. c. 4 Dill. C. C. 330; *Luxembourg Rd. v. Magnay*, 25 Beav. 586; *Corbett v. Woodward*, 5 Saw. C. C. 403; *Bliss v. Matteson*, 45 N. Y. 22; s. c. 52 Barb. 335; *Koehler v. Black River, &c., Rd.*, 2 Black 715, 720; *Charitable Corp. v. Sutton*, 2 Atk. 404; *Robinson v. Smith*, 3 Paige Ch. 222; s. c. 24 Am. Dec. 212; *Flitcraft's Case*, 21 L. R., Ch. Div. 519; s. c. 52 Law Jour. R. (N. S.) 27; *Jones v. Morrison*, 31 Minn. 140, *et seq.*; *San Diego v. Railroad*, 44 Cal. 106. "Out of the identity of these relations necessarily spring the same duties, the same dangers, and the same policies of the law:" *Bedford v. Bowser*, 48 Penn. St. 29; *Abbot v. American Hard Rubber Co.*, 33 Barb. 578; *Overend Gurney Co. v. Gibb*, 42 L. J. Ch. 67; L. R., 5 Eng. & Irish App. 480.

Hence as such trustee or agent, a director cannot legally exercise his powers for his own personal ends against the

interests of his beneficiary; he cannot make profits out of the trust property or his office, nor assume a position antagonistic to his fiduciary character. He is required to exercise the highest good faith in executing his trust; is strictly accountable for all losses occasioned by breach of or neglect of duty; must turn over to the *cestui que trust* all profits realized from the trust property or office: *Goodin v. Cincinnati, &c., Rd.*, 18 Ohio St. 183; 2 Lind. on Part. (Ewell's ed.), *591; 1 Perry on Trusts, § 427; *Sudgen v. Crossland*, 3 Sm. & G. 192; *Sloo v. Law*, 3 Blatch. 459; *Jackson v. Ludeling*, 21 Wall. 625; *Bain v. Brown*, 56 N. Y. 285; *Ackerman v. Helsey*, 38 N. J. Eq. 501; s. c. Am. & Eng. Corp. Cases 239; *Penna. Rd. Co.'s Appeal*, 80 Penn. St. 265; *Abbot v. Am. Hard Rubber Co.*, 33 Barb. 578; *Peabody v. Flint*, 6 Allen 52, 56, *et seq.*

Many cases hold that the rule which forbids a trustee from dealing with the trust property in his personal capacity, is so strict that it inhibits all inquiry into the fairness of the transaction: *Story on Agency* (9th ed.), sects. 210, 211, pp. 239, 247; 1 *Story's Eq. Jur.* (11th ed.), 322, p. 340; *Pars. on Cont.* (7th ed.) 87; *Ashuelot v. Elliot*, 57 N. H. 397; *Lowther v. Lowther*, 13 Ves. 103; *East India Co. v. Henchman*, 1 Ves. Jr. 289; *Davoue v. Fanning*, 2 Johns. Ch. 252; *McConnell v. Gibson*, 12 Ill. 128; *Dwight v. Blackmar*, 2 Mich. 330; *Michoud v. Girod*, 4 How. 503; *Green v. Sergeant*, 23 Vt. 466; *Aberdeen Ry. v. Blaikie*, 1 Macq. 461; *Gardner v. Ogden*, 22 N. Y. 327; *Duncomb v. Rd.*, 84 Id. 190; *Coleman v. Second Ave Rd.*, 38 Id. 201; *Barnes v. Brown*, 80 Id. 527; *Ruisin v. Clark*, 41 Md. 158; s. c. 20 Am. R. 66; *Rice v. Wood*, 113 Mass. 133; *Marsh v. Whitmore*, 21 Wall. 178; *Goodin v. Canal Co.*, 18 Ohio St. 169; *Railroad v. Kelly*, 77 Ill. 426; *Currier v. Green*, 2 N. H. 225; *Perkins v. Thompson*, 3 N. H. 144; *Brackett v. Tillotson*, 4 Id. 208; *Remick v. Butterfield*,

31 Id. 70; *Hoitt v. Webb*, 36 Id. 158, 163; *Sparkhawk v. Allen*, 21 Id. 9; *French v. Currier*, 47 Id. 88; *Hoitt v. Russell*, 56 Id. 559; *Holt v. Holt*, 1 Ch. Cas. 190; *Coles v. Trecothick*, 9 Ves. 234; *Ex parte Hughes*, 6 Id. 617; *Ex parte Bennett*, 10 Id. 385; *Oliver v. Court*, 8 Price 127; *Fox v. Mackreth*, 2 Bro. Ch. 400; *York Building Co. v. Mackenzie*, 8 Bro. P. C. 42; *Molony v. Kernan*, 2 Dru. & War. 31; *Murphy v. O'Shea*, 2 Jones & Lat. 422; *Moore v. Moore*, 1 Seld. 256; *Conger v. Ring*, 11 Barb. 356; *Pensonneau v. Bleakley*, 14 Ill. 15; *Clute v. Barron*, 2 Mich. 330; *Allen v. Bryant*, 7 Ired. Eq. 276; *White v. Trotter*, 14 Sm. & M. 30; *Buell v. Buckingham*, 16 Ia. 284; *Hatch v. Hatch*, 9 Ves. 297; *Whelpdale v. Cookson*, 1 Ves. Sr. 9; *Hughes v. Watson*, Scotland 1846; *Hall v. Brown*, 3 Bro. C. C. 177; *Keech v. Sandford*, 3 Eq. Cas. Abr. 741; *In re Bloye's Trust*, 1 Mac. & G. 488; *Ex parte James*, 8 Ves. 337; *Ogden v. Murray*, 39 N. Y. 202; *Torrey v. Bank*, 9 Paige 649; *Jecett v. Miller*, 10 N. Y. 402; *Van Epps v. Van Epps*, 9 Paige 237; *Bergen v. Bennett*, 1 Caines Cas. 19; *Munro v. Allaire*, 2 Id. 183; *Yeakell v. Litchfield*, 13 Allen 417; 4 Kent's Com. 438.

Other cases permit an investigation of the transaction, yet where such inquiry may be had, the burden is upon the trustee or agent to vindicate his dealings from all suspicion, and establish their perfect fairness and equity: *Cruce v. Cruce*, 81 Mo. 676, 685; *Cumberland Coal & Iron Co. v. Parish*, 42 Md. 598; *Rice's Appeal*, 79 Penna. St. 168, 204; *Pairo v. Vickery*, 37 Md. 467; *Flagg v. M. Ry. Co.*, 21 Am. Law Reg. 775; *St. James' Church v. Church of Redeemer*, 45 Barb. 356; *Pearson v. Concord Rd.*, 16 Rep. 463, 464; *Rolling Stock Co. v. Rd.*, 34 Ohio St. 466; 1 Story's Eq. Jur. (11th ed.) sects. 311, pp. 321, 322; 1 Perry on Trusts (2d ed.), sect. 209; *Pierce on Railroads* 36; *Morawetz on Priv. Corp.*, sec. 245; *Angell & Ames on*

Corp. (11th ed.), sect. 233, n. a, sect. 312; *Adams's Doctrine of Equity* 60; *Beeson v. Beeson*, 9 Penn. St. 280; *Ashhurst's Appeal*, 60 Id. 290; *McNeils v. Gates*, 41 Ark. 264, 269.

If such fairness is not established, courts of equity treat the case as one of constructive fraud: 1 Story's Eq. Jur. (11th ed.) sect. 311, 321, 322; *Cumberland Coal & Iron Co. v. Parish*, 42 Md. 598; *Pairo v. Vickery*, 37 Id. 467.

Fraud need not be established to compel the trustee or agent to account for profits realized out of the trust property or his office: *Davoue v. Fanning*, 2 John. Ch. 255, 260; *N. Y. Cent. Ins. Co. v. Nat. Prot. Ins. Co.*, 14 N. Y. 85, 91; *Conkey v. Bond*, 36 Id. 427, 429; *Gillett v. Peppercorne*, 3 Beav. 78, 84; *Currier v. N. Y. & C. Rd.*, 35 Hun (N. Y.), 355; *Marsh v. Whitmore*, 21 Wall. 178, 183; *Michoud v. Girod*, 4 How. 503; *Flagg v. Manhattan Ry. Co.*, 21 Am. L. Reg. (N. S.), 787, 788; *Greenlaw v. King*, 3 Beav. 49, 61; *Ex parte James*, 8 Ves. 337, 344; *Metropolitan Elevated Rd. v. Manhattan Elevated Rd.*, 11 Daly's Rep. 373, 473 *et seq.*

He must account for all profits improperly made, for all moneys improperly received, and for losses occasioned by breaches of trust or neglect of duty. For instance, contracts with the corporation in which the trustee is interested: *Jackson v. Ludeling*, 21 Wall. 616; *Hoffman v. Coal Co.*, 16 Md. 486; *Brewster v. Stratman*, 4 Mo. App. 41; *European Rd. v. Poor*, 59 Me. 277; 1 Story's Eq. Jur. (11th ed.), 339, sect. 321; 1 Lindley on Part. 553, 590; *Mercantile Mut. Ins. Co. v. Hope Ins. Co.*, 8 Mo. App. 408; *Wardell v. Union P. Rd.*, 103 U. S. 651, 658, s. c. 4 Dill. C. C. 330; *Gilman, & C. Rd. v. Kelly*, 77 Ill. 426, 434; *U. S. Rolling Stock Co. v. Atlantic Rd.*, 34 Ohio St. 450, 465; *Mower v. Staples*, 32 Minn. 284, 289; *Pierce on Railroads* 43, and cases; *Ewell's Evans on Agency*, sect. 4, p. 375, *et seq.*; *Stewart v. Lehigh Val-*

ley Rd., 38 N. J. L. 522; *Pains v. Louisville Rd.*, 31 Ind. 283; *Green's Brice's Ultra Vires* 479, 480, n. a; *Hoyle v. Rd.*, 54 N. Y. 314, 328, 329; *Aberdeen Ry. v. Blakie*, 1 Macq. H. L. Cas. 461; *Harts v. Brown*, 77 Ill. 226; *Mayor v. Innman*, 57 Ga. 370; *Alford v. Miller*, 32 Conn. 543; *Polar Star Lodge v. Sime*, 16 La. Ann. 76; *Railroad v. Bowler*, 9 Bush 468; *Jones v. Ark. Agr. & Mech. Assoc.*, 38 Ark. 17; *Blake v. Rd.*, 56 N. Y. 485; *Port v. Russell*, 36 Ind. 60, 64. He must restore all profits made out of the trust property, "to the utmost extent:" *The York, &c., Rd. v. Hudson*, 16 Beav. 485; *Parker v. McKenna, L.R.*, 10 Ch. Ap. 96; 1 Lindley on Part. 576, 587, 588 (Ewell's ed.); *Pomeroy v. Benton*, 57 Mo. 531, s. o. 77 Mo. 64, (full statement of the law); 1 Perry on Trusts (3d ed.) 250, sect. 207; Id. 538, sect. 432; *Ryan v. L. A. & N. W. Ry.*, 21 Kansas 365, 398; *Bank v. Downey*, 53 Cal. 466, s. c. 31 Am. Rep. 62; *Mercantile Credit Assoc. v. Coleman, L. R.*, 6 H. Lds. 189; *Paine v. Rd.*, 31 Ind. 282; *Koehler v. Black River Falls Iron Co.*, 2 Black 720; *Morawetz on Priv. Corp.*, sect. 244; *Field on Corp.*, sect. 174, and note 3; Id., sect. 175; *Woods's Field on Corp.* (2d ed.), sect. 156; *Gilman, &c., Rd. v. Kelly*, 77 Ill. 426, 435 (full statement of the law); *Green's Brice's Ultra Vires* 477-8, and cases in note a; Id. 480, 481, 482; *Jackson v. Ludeling*, 21 Wall. 616; *Purshall's Appeal*, 65 Penn. St. 224; *Tyrell v. Bank of London*, 10 H. Lds. C. 26; *Foss v. Harbottle*, 2 Hare 461; *Brewer v. Boston Theatre*, 104 Mass. 395; *Gregory v. Patchett*, 33 Beav. 595; *Atwood v. Merryweather, L. R.*, 5 Eq. 464 n.; *Barnes v. Brown*, 80 N. Y. 535; *Benson v. Hawthorne*, 1 Y. & C. (Ch.) 326; *Gaskell v. Chambers*, 26 Beav. 360; 9 Eq. Rep. 480; *King v. Wise*, 43 Cal. 628, 634; 1 Perry on Tr. (3d ed.), sect. 429; *Morrison v. Ogdensburg Rd.*, 52 Barb. 173; *Simons v. Vulcan Oil &*

Mining Co., 61 Penn. St. 202, 217. If losses result to the beneficiary in consequence of illegal acts: 1 Lindley on Part. (Ewell's ed.), 592; *Society of Practical Knowledge v. Abbott*, 2 Beav. 559; *Ackerman v. Halsey*, 38 N. J. Eq. 501, s. o. 1 Am. and Eng. Corp. Cas. 239; as in carrying on a rival business: *Lengle v. Nat. Ins. Co.*, 45 Mo. 109; *Glassington v. Thwaites*, 1 Sim. & St. 124; *England v. Curling*, 8 Beav. 129; *Brewster v. Stratman*, 4 Mo. App. 42; *Covington Rd. v. Bowler*, 9 Bush (Ky.), 468; *McAllen v. Woodcock*, 60 Md. 174; *Stewart v. Lehigh Valley Rd.*, 38 N. J. L. (9 Vroom) 505; *Gardner v. Butler, (N. J.)*, 3 Stewart 702, 721; *Drury v. Cross*, 7 Wall. 299; *Meeker v. Winthrop Iron Co.*, 17 Fed. Rep. 48; or in speculating in the trust property, as in purchases and sales, the trustee must make good the loss. "Directors cannot sell to or for themselves." They cannot unite in themselves the opposite characters of buyer and seller: 1 Story's Eq. Jur. (11th ed.), sect. 321; *Cook v. Berlin Woollen Co.*, 43 Wis. 433; *Cumberland Coal & Iron Co. v. Sherman*, 30 Barb. 553, s. o. 8 Am. Law Reg. 333; *Cumberland Coal & Iron Co. v. Parish*, 42 Md. 598; *Coleman v. Second Av. Rd.*, 38 N. Y. 201.

Joint Liability.—Nor is the liability confined to the director, trustee or agent who actually participates in the wrong, but he is liable for the spoliation of co-trustees of which he had notice, or which he might have prevented by proper diligence: *Joint Stock Discount Co. v. Brown, L. R.*, 8 Eq. Cas. 381; *Land Credit Co. v. Lord Fernroy, L. R.*, 5 Ch. App. Cas. 763; *Ryan v. Rd.*, 21 Kansas 365; *Simons v. Vulcan Oil Co.*, 61 Penn. St. 202; *Robinson v. Smith*, 3 Paige Ch. 222, s. o. 24 Am. Dec. 212; *Heath v. Erie Rd.*, 8 Blatchf. 347, 411.

Where trustees are jointly implicated in a breach of trust, the beneficiary may hold either one or all for the whole loss; *Wilkinson v. Parry*, 4 Russ. 272; *Lewin*

on Trusts, 8th ed. 1885, p. 988, par. 31; *Chancellor v. Morecraft*, 11 Beav. 264; *Lyse v. Kingdon*, 1 Collyer 184; 2 Perry on Trusts, 3d ed., p. 496, sect. 848; *Wilson v. Moore*, 1 M. & K. 146; Story's Eq. Pl., 9th ed., sect. 213, pp. 199, 200, and cases; 2 Story's Eq. Jur., 11th ed. sect. 1280, p. 596; Id. sect. 1257; *Franco v. Franco*, 3 Vcs. 75; *Rehden v. Wesley*, 29 Beav. 215; *Jenkins v. Robertson*, 1 Eq. Rep. 123; *Richardson v. Jenkins*, 1 Drewry 477, 483; *Walker v. Symonds*, 3 Swanst. 75; *May v. Selby*, 1 Y. & Coll. Ch. 235; *Bridget v. Hames*, 1 Coll. 72.

Active participation in the misfeasance is not required, nor actual knowledge that an abuse of trust is intended; silent connivance is sufficient to charge the trustee, when it may be observed to afford the means of rendering the misconduct of the others effective: *Weetjen v. Vibbard*, 5 Hun (N. Y.) 265; 2 Story's Eq. Jur., 11th ed., p. 590, sect. 1275. Negligence or supine indifference on the part of the trustee respecting his duties to the trust, although he had no hand in the spoliation, is sufficient to charge him: *Robinson v. Smith*, 3 Paige Ch. 222; s. c. 24 Am. Dec. 212; *Percy v. Millaudon*, 3 La. 568; *Smith v. Pettigrew*, 34 N. J. Eq. 216; *Charitable Corp. v. Sutton*, 2 Atk. 400.

Ratification and Acquiescence.—Of course the beneficiary may ratify the acts of the trustee when the latter occupied these dual positions, as buyer and seller, &c., and will thus be barred from relief, or he may assent to them by his silence; but acquiescence to produce a bar must take place with full knowledge, by the beneficiary, of all facts; and many cases hold that it must also be with full knowledge of his legal rights arising from those facts. Nothing short of this will amount to such acquiescence as will defeat the liability of a defaulting fiduciary: 2 Pomeroy's Eq. Jur., sect. 1083, p. 662; *Hoffman Steam Coal Co. v. Cumberland Coal Co.*, 16 Md. 456;

Ryan v. Leavenworth Rd., 21 Kan. 365, 406; *Gilman Rd. v. Kelly*, 77 Ill. 426; Kerr on Fraud and Mistake, pp. 156, 300, 302; 1 Lindley on Part. (Ewell's ed.) 538; *Wardell v. Railroad*, 103 U. S. 651; s. c. 4 Dill. C. C. 330; *Morawetz on Priv. Corp.*, sect. 242; *Pickering v. Stephenson*, L. R., 14 Eq. 322; *Minor v. Mechanics' Bank*, 1 Pet. 46, 71; *Salem Bank v. Gloucester Bank*, 17 Mass. 1, 30; *St. James Church v. Church of Redeemer*, 45 Barb. 356; *City of Oakland v. Carpenter*, 13 Cal. 540, 552. The doctrine of ratification proceeds upon the principle that such contracts are not void, but voidable only at the objection of the *cestui que trust*. See cases, *supra*.

Laches.—So the beneficiary will be denied relief if he suffers the transactions to stand an unreasonable length of time, without taking the proper steps to rescind them: *Chapman v. Madison Rd.*, 6 Ohio St. 119; *Peabody v. Flint*, 6 Allen 57; *Tash v. Adams*, 10 Cush. (Mass.) 252; *Samuel v. Holladay*, 1 Woolv. 416. But that the defaulting trustee may invoke laches as a defence, there must be full and complete knowledge on the part of the *cestui que trust*, of all of the facts of the dealings, and where such knowledge is wanting, this plea is unavailing: *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587, 593; *Badger v. Badger*, 2 Wall. 87, 92, 93; *Harwood v. Rd.*, 17 Id. 78; *Gilman Rd. v. Kelly*, 77 Ill. 426, 437; *Hoffman Steam Coal Co. v. Cumberland Co.*, 16 Md. 456, 468, and cases cited in opinion, pp. 468-470; *Ryan v. Rd.*, 21 Kan. 365, 404; *Oakland v. Carpenter*, 13 Cal. 540, 552.

Limitation.—In these cases it is the duty of the beneficiary to make complaint and adopt measures to avoid such transactions, within a reasonable time after he has become fully acquainted with all the facts. But what is such reasonable time must, of course, be determined by the chancellor, upon the circumstances of each particular case. No

general rule can be formulated. Mr. Justice MILLER, in *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 591, says: "The doctrine is well settled that the option to avoid such sale must be exercised within a reasonable time. This has never been held to be any determined number of days or years, as applied to every case, like the statute of limitations, but must be decided in each case upon all elements of it which affect that question. There are generally the presence or absence of the parties at the place of the transaction, their knowledge or ignorance of the sale and of the facts which render it voidable, the permanent or fluctuating character of the transaction, as affecting its value, and the actual rise or fall of the property in value during the period within which this option might be exercised. In fixing this period in any particular case, we are but little aided by the analogies of the statute of limitations; while, though not falling exactly within the rule as to the time for rescinding, or offering to rescind, a contract by one of the parties to it for actual fraud, the analogies are so strong as to give to this latter great force in the consideration of the case. In this class of cases the party is bound to act with reasonable diligence as soon as a fraud is discovered or his right to rescind is gone. No delay for the purpose of enabling the defrauded party to speculate upon the chance which the future may give him of deciding profitably to himself, whether he will abide by his bargain, or rescind it is allowed in a court of equity."

In *Harwood v. Rd.*, 17 Wall. 81, it is said: "Without reference to any statute of limitations, the courts have adopted the principle that the delay which will defeat a recovery must depend upon the particular circumstances of each case." The Supreme Court of Missouri, after citing a number of cases, said, in *Kitchen v. Rd.*, 69 Mo. 265: "The doctrine as recognised in the above cases is that the option to avoid such a sale, as is here

complained of, must be exercised within a reasonable time, and unless so exercised equitable relief will be denied, especially when new rights, equities and interests have arisen, and the parties cannot be restored to their original position." In *Graham v. Birkenhead*, 2 McN. & G. 156, eighteen months was considered too long. In *Badger v. Badger*, 2 Wall. 87, 92, 93, it is said where the trust is clearly established and the facts have been fraudulently concealed by the trustee from the knowledge of the *cestui que trust*, lapse of time will not bar the latter's rights. In *Marsh v. Whitmore*, 21 Wall. 178, an attorney sold bonds of a client at public sale and bought them in himself, and the client was fully aware of the purchase and acquiesced in it for twelve years; *held* too late to impeach the sale. In *Vigers v. Pike*, 8 Cl. & Fin. 562, 650, a trustee of the company made a contract with a third person from which he realized a profit at the expense of the company. The company had full knowledge of all the facts and acquiesced in it for a considerable length of time; *held*, it could not be rescinded. The court said the defendant cannot raise a more effectual bar "than by showing that the plaintiff, who, from the beginning, cognisant of all of the matters complained of, or after full information concerning them, continued to deal with the property, and even to exhaust in the enjoyment as by working the mines." In *Wentworth v. Lloyd*, 32 Beav. 467, an agent purchased property of his principal in his representative capacity. The principal had full knowledge of it and did not bring suit for six years; *held*, too late. See, also, *Gregory v. Patchett*, 33 Beav. 595; *Hazelhurst v. Savannah Rd.*, 43 Ga. 13, 56; *Cozart v. Ga. Rd. & Banking Co.*, 54 Ga. 379; 2 High on Inj. (2d ed.) sect. 1229, p. 803; Id. sect. 1205, p. 792; Id. sect. 1206, p. 793.

Lapse of Time will not Bar Direct Trust.—It is a well-settled principle of

equity that lapse of time will not bar a continuing and subsisting trust—one that will be recognised only in a court of equity, as between trustee and *cestui que trust*: Lewin on Trusts (8th ed., 1885) 863; Perry on Trusts (3d ed.), sect. 228; *Decouche v. Savetier*, 3 Johns. Ch. 190, 216; *Cholmondeley v. Clinton*, 2 Merivale 360; *Scott v. Haddock*, 11 Ga. 258, 263; *Stone v. Stone*, L. R., 5 Ch. App. 74; *Woodhouse v. Woodhouse*, L. R., 8 Eq. 514; *Carpenter v. Cushman*, 105 Mass. 417; *Kane v. Bloodgood*, 7 Johns. Ch. 90; *Bailey v. Barnett*, 12 Mo. 3; *Dillon v. Bates*, 39 Id. 292; *Hill v. Bailey*, 8 Me. App. 85, 89. In such cases the Statute of Limitations is inapplicable: *Bright v. Legerton*, 29 Beav. 60; *Obee v. Bishop*, 1 De G., F. & J. 137. An agent who stands in a fiduciary relation to his principal cannot claim advantage of lapse of time: *Bardick v. Garrick*, L. R., 5 Ch. App. 233. "The question is, in effect, whether delay will purge a fraud? Never while I sit here! Every day adds to its injustice and multiplies its oppression," per Lord NORTHINGTON, in *Alden v. Gregory*, 2 Eden 280. "It is certainly true that length of time is no bar to a trust—clearly established trust; and in cases where fraud is imputed and proved, length of time ought not, on principles of eternal justice, to be admitted to repel relief. On the other hand it would seem that the length of time during which the fraud has been successfully concealed and practiced, is rather an aggravation of the offence, and calls more loudly upon a court of equity to give ample and decisive relief," per STRONG, J., in *Prevost v. Gratz*, 6 Wheat. 481. "No length of time can prevent the unkennelling of a fraud;" per Lord ERSKINE, quoted in *Badger v. Badger*, 2 Wall. 92.

But that lapse of time may not constitute a bar the trust must be direct and exclusive, cognisable in a court of

equity, and the question between the trustee and *cestui que trust*: *McCandless's Estate*, 61 Penn. St. 9; 2 Story's Eq. Jur. (11th ed.) sect. 1520 a, p. 851; 2 Pomeroy's Eq. Jur., sect. 1083, p. 662; *Phillippi v. Phillippi*, 116 U. S. Rep. 151.

"The trusts intended by a court of equity not to be reached or affected by the Statute of Limitations, are those technical and continuing trusts which are not at all cognisable at law, but fall within the proper, peculiar and exclusive jurisdiction of courts of equity:" *Johnson v. Smith's Admr.*, 27 Mo. 591. See *Carr v. Thompson*, 87 N. Y. 160; *Ashhurst's Appeal*, 60 Penn. St. 290; *Rogers v. Brown*, 61 Mo. 187.

Many cases hold that the Statute of Limitations may be invoked in all cases where the trust is raised by implication of law, and where an action at law could be maintained to recover the money affected by the trust: *Barbien v. Barbien*, 23 How. 207; *Robinson v. Hook*, 4 Mason 152, and cases cited; *Wells v. Perry*, 62 Mo. 573; *Smith v. Ricords*, 52 Id. 581; s. o. 56 Id. 553; *Keeton v. Keeton*, 20 Id. 530.

Courts of equity frequently follow by analogy the Statute of Limitations, as adopted by the law courts, in proceedings like in the principal case. But in purely equitable actions courts of equity usually "act solely upon their own inherent rules, altogether outside of and independent of the Statute of Limitations:" *Kelly v. Hurt*, 74 Mo. 561. If there has been gross laches in prosecuting the claim, or long acquiescence in the prosecuting of adverse rights, it will refuse to interfere, though less than the statutory period has elapsed: Id. See *Twin Lick Oil Co. v. Marbury*, *supra*: *Bliss v. Prichard*, 67 Mo. 181, where the whole doctrine is fully discussed: *Smith v. Washington*, 11 Mo. App. 519, 525.

Facts Relating to the Discovery of the

Fraud must be fully set out.—And where the question arises as in the principal case, where the plaintiff seeks to avoid the statute of limitations, many authorities hold that the facts relating to the discovery of the fraud should be fully stated in the defence, *e. g.*, when and how the facts were discovered, &c., that the defendant may be permitted to meet them at the trial: *Moore v. Granby Mining & Smelting Co.*, 80 Mo. 91. "The circumstances of the discovery must be fully stated and proved or the delay which has occurred must be shown to be consistent with the requisite diligence:" *Car v. Hilton*, 1 Curt. C. C. 390. "As lapse of time necessarily obscures the truth, and destroys the evidence of past transactions, courts of chancery will exercise great caution in sustaining bills which seek to disturb them. They will hold the complainant to stringent rules of pleading and evidence, and require him to make out a clear case. * * * There must be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the evidence is, so that the court may clearly see whether by the exercise of ordinary diligence, the discovery might not have been made sooner:" *Stearns v. Page*, 7 How. 828, 829. "The bill must be specific in stating the facts and circumstances which constitute the fraud, and also as to the time it was discovered. This is necessary to enable the defendant to meet the fraud and the alleged time of its discovery:" per Mr. Justice McLEAN in *Moore v. Green*, 19 How. 72. "The party who makes such appeal (to avoid the statute) should set forth in his bill, specifically what were the impediments to an earlier prosecution of the claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance, and how and when he first came to a knowledge of the matters alleged in his bill:" *Badger v. Badger*, 2

Wall. 87, 92, 93. See also *Wood v. Carpenter*, 101 U. S. 140.

Champerty.—It is a well settled principle, founded upon public policy, that actions growing out of a champertous agreement cannot be maintained: *Gilbert v. Holmes*, 61 Ill. 556; *Curdwell v. Sprigg*, 7 Dana (Ky.) 39; *Barnes v. Strong*, 1 Jones Eq. (N. C.) 100; *Vincent v. Ashley*, 3 Head (Tenn.) 594; *Haynes v. Coyne*, 10 Tenn. 343; *Coughlin v. N. Y. & H. R. Rd.*, 71 N. Y. 452; *Crowley v. Vaughan*, 11 Bush (Ky.) 517. *Rives v. Weaver*, 36 Miss. 383; *Greenman v. Cohee*, 61 Ind. 206; *Barker v. Barker*, 14 Wis. 143; *Weekly v. Hall*, 13 Ohio 175; *Webb v. Armstrong*, 5 Humph. 381; *Arden v. Patterson*, 5 Johns. Ch. 44; *Duke v. Harper*, 66 Mo. 58; *Harman v. Brewster*, 7 Bush 355; *Brown v. Beauchamp*, 5 Mon. (Ky.) 416.

This is an old principle, but the law as expounded by the earlier judges and law writers is still in force. "There is nothing in the law of champerty, as expounded by Blackstone and Bouvier and the American courts in the adjudicated case, which we have cited, that is not applicable to our condition. The race of intermeddlers and busy-bodies is not extinct * * * A man may have a doubtful claim to property in the possession of another, who would hesitate to incur the expense of testing its validity, will readily agree that one who will bear the burden of the contest and take part of the recovery for his pay, may institute the suit in his name. Such contracts are champertous, and should be so held on principle everywhere:" *Duke v. Harper*, 66 Mo. 60.

And when the fact that such a suit is being prosecuted on such a contract comes to the knowledge of the court, a number of cases hold that the court should dismiss the proceedings: *Morrison v. Deaderick*, 10 Humph. (Tenn.) 342; *Webb v. Armstrong*, 5 Id. 379; *Barker v. Barker*, 14 Wis. 142; *Swanston v. Morning Star Mining Co.*, 13 Fed. Rep. 1882, p. 215. But others hold that the fact that the suit

is being prosecuted under a champertous contract is no defence, but that its legality can be attacked only in a proceeding to enforce the contract, see cases cited in opinion of principal case. In the principal case the court refused to interfere,

as the plaintiff's title by which he sought to enforce his right was not affected by the illegal contract.

EUGENE McQUILLIN.

St. Louis, Mo.

Supreme Court of Michigan.

THOMAS v. CAULKETT.

A contract between a physician and a party injured by a railroad company that the physician shall go with the injured party to the counsel and medical advisers of the company and explain the nature and extent of the injuries, and receive as compensation for so doing an amount graded by the amount awarded by the company, is illegal and void.

ERROR to Allegan.

Pope & Hart, for plaintiff.

Thew & Latta, for defendant and appellant.

CAMPBELL, J.—Plaintiff sued defendant for services in going with him from Allegan to Detroit, and giving his views about defendant's condition, arising out of injuries in a railroad accident upon the Lake Shore & Michigan Southern road. There were some further items for expenses and treatment. The defendant considered that he had a cause of action for his injuries, and had some correspondence with the company, who would not pay him what he was willing to accept. Finally it was arranged that he should go to Detroit and confer with the counsel of the company, and, if necessary, be examined. Plaintiff was to go with him, and defendant procured a pass for both. Plaintiff had also a desire to attend a medical commencement. The parties differ in their statements concerning the terms and arrangements.

Plaintiff testified in substance that, having ascertained that defendant was willing to accept \$1200, although, as both testify, he thought he ought to have \$1500, or more, they had a conference, in which it was understood that if defendant received \$1500, plaintiff should have \$300; if \$2000, \$500; and in similar way for a larger sum. Plaintiff's employment was to lay the facts before the company's counsel and medical advisers. At Detroit, at plaintiff's suggestion, defendant was examined by another surgeon; and he was also

examined by Dr. McLean, the company's surgeon; and a settlement was finally had upon Dr. McLean's report of the case, the amount having been reached by a reduction of defendant's demand of \$2500 down to \$1500. Defendant did all the pecuniary negotiating himself, but plaintiff advised him at different times what to demand, and that he ought to have all that he asked.

The declaration contained a special count and the common counts. Such questions as arose under the special count, as such, were put out of the case by its relinquishment on trial. As the demand for compensation was for money actually due under any contract, if one existed, it was recoverable under the common counts. The verdict of the jury was for an amount which, if based on the special contract, must have left out items additional which had testimony to support them. Nevertheless, we cannot say, as matter of law, that the finding may not have been based on the special agreement to which plaintiff testified. We must therefore treat it as in the case.

Upon the proof of the value of plaintiff's services, apart from any special contract, we do not see that the testimony was improper. It cannot be held, as matter of law, that the value of scientific services depends on a man's actual average daily receipts. If that were so, there could be no room for advancement. A physician's services may be worth much more than this. A jury may properly have before them all the elements which will aid them in forming a judgment, and may, where these elements are various, draw their own conclusions by comparison. The services rendered here were the description and medical interpretation of a serious and somewhat obscure injury, which, it seems likely from the testimony of the witnesses, required considerable professional skill to perceive and appreciate, and describe clearly. It appears also that the conclusions and descriptions of plaintiff corresponded with those of the other gentlemen who acted in the matter. The value of a physician's services of that kind could not very well be measured by his usual receipts in daily business to such an extent as to exclude opinions of competent men as to their worth.

The only really important question before us is whether the special contract testified to, and on which the jury may have acted, was legally valid. The testimony of defendant, as well as of other witnesses, fails to indicate that plaintiff made any statements which were not accurate. But the contract must be measured by its tendency, and not merely by what was done to carry it out. There

is no particular reason to suppose defendant got any more than he should have got. This, however, is not the test. When we come down to the real nature of this alleged contract, it is one which contemplated that plaintiff was to give his view of the facts relating to defendant's physical condition and injuries, as they had existed and been developed under his observation, and the medical bearing of these facts, and the extent of past or future dangers and sufferings. While it is probable, from the medical testimony, that the present condition and future prospects can be got at with considerable certainty, yet it is also possible that some complications may escape detection, and some appearances may be ambiguous, unless explained by previous symptoms or conditions. Beyond this there can be no doubt that suggestions may often be made by one physician which will aid others, to whom they might not have occurred from their own experience or observation.

Under these circumstances, it is at least possible, if not probable, that the judgment ultimately formed will depend very much on the facts and opinions, and the coloring of the statements furnished by the person relied upon as best informed. He puts himself in a position where both parties are expected to rely upon him, and to act on what he says. When, under such circumstances, he makes the disclosure of his knowledge and opinions the subject of a contract, whereby his compensation is to depend on the amount obtained by his employer by reason of the disclosure, it is plain that he puts himself in a position where it is his interest to exaggerate. If he were to explain to those whom he is to influence that he is acting under such an employment, and as a solicitor, then there would be nothing to put him on a different footing than other known agents. But no such explanation was contemplated, and none given. And, however honest a man's actual intentions may be, and however truthful he may be, there is a direct temptation to misrepresent, and a direct danger that the misrepresentation will operate injuriously to the parties dealt with. Such secret agreements by persons putting themselves in positions of confidence come within recognised prohibitory rules as tending to defraud. In such cases we cannot expect to find precisely analogous precedents, but the principle is familiar and of long standing. It belongs with the class of combinations to raise prices by biddings at auction, or other devices whereby the illegality is not worked out merely by success, but inheres in the transaction itself, and with those contracts where success is

dependent on personal influence and persuasion, having the appearance of disinterestedness. Upon this point the court we think erred in not so charging the jury ; and therefore the judgment must be reversed and a new trial ordered.

COOLEY, C. J., and CHAMPLIN, J., concurred.

We do not remember ever before to have seen a case touching upon the question involved in the principal case. But although it may be new in this instance, the reasoning upon which the conclusion arrived at is based, is so sensible and clear that there would seem to be no room for doubting its correctness.

In the language of Lord Chief Justice WILMOT, in the leading case of *Collins v. Blantern*, 2 Wilson 341 ; s. c. 1 Smith's Lead. Cas. *489, "This is a contract to tempt a man to transgress the law, to do that which is injurious to the community ;" and, although no actual wrong may have been done, as was well observed by the learned judge who delivered the opinion of the court, "the contract must be measured by its tendency, and not merely by what was done to carry it out." See *Bliss v. Matteson*, 52 Barb. 335, 348.

The American editors of Smith's *Leading Cases*, in their note to *Collins v. Blantern*, above cited, have well expressed the rule that should govern cases of this sort : "It should, moreover, be remembered that there are contracts which the law will not permit to be made, and acts which it views with disapprobation, not because they are necessarily wrongful, but because they are attended with temptation to fraud or misconduct, which human nature is not strong enough to resist, and should, consequently, be taught to avoid : *Fuller v. Dame*, 18 Pick. 472 ; 1 Lead. Cas. in Eq. (3d Am. ed.) 211. An agent is not allowed to buy what he has been employed to sell ; an administrator to traffic with the money of the estate ; or any one acting in a fiduciary capacity to enter into an agreement by which he

may be led to make a profit at the expense of his trust. The particular transaction may be entirely free from blame, but it will not on that account be less liable to be set aside as constructively marked with fraud."

We cannot do better in this connection than quote from the opinion of Chief Justice SHAW, in the case of *Fuller v. Dame*, 18 Pick. 472 : "The law goes further than merely to annul contracts, where the obvious and avowed purpose is to do or cause the doing of unlawful acts ; it avoids contracts and promises made with a view [and he might well have added where the natural tendency of the contract is] to place one under wrong influences, those which offer him a temptation to do that which may injuriously affect the rights and interests of third persons. A person having property, and being of sound mind, may make a will in favor of whom he pleases. A common friend may lawfully represent to him the expediency and fitness of making a bequest in favor of a particular individual, and may repeat that representation both in conversation and in writing. Writing letters at the request of another and for his benefit would, under ordinary circumstances, be a proper consideration for a promise of compensation. But to promise to pay another for soliciting a will in his favor would be void : *Debenham v. Ox*, 1 Ves. Sen. 276. A man might entertain a very sincere opinion that a marriage between a gentleman of his acquaintance and a lady of considerable fortune would be highly beneficial and contribute to the happiness of both parties, and he might lawfully propose this to one or both. But any promise of reward made to him

to induce him to do this, or any promise made afterwards in consideration of such service would be void. This is founded upon the general consideration of fitness and expediency. Such advice and solicitation, in whatever form the agency may be executed, are understood to be disinterested, and to flow from a single regard to the interests of the parties. They are lawful only so far as they are free and disinterested. If such advice and solicitation, thus understood to be pure and disinterested, may be justly offered from mercenary motives, they would produce all the consequences of absolute misrepresentation and falsehood. It is understood to be the offer of disinterested good offices, and the measure proposed to be recommended by the unbiased judgment of the person offering it; whereas, it is, in fact, an offer flowing from unavowed motives of pecuniary interest, and the recommendation is the result of a judgment biased by a hope of a large reward. If rewards might be taken in consideration of the exertion of direct or indirect influence, either by the person acting under it or by others who should be influenced and moved by him, it would destroy all confidence; it would lead to false and unfair representations

and dealings, and be productive of infinite mischief."

The cases which illustrate the general principles so well stated are numerous. Only a few will be cited. An agreement by which one promises to use his influence with the directors of a railroad company to secure for another a lucrative building contract, is injurious in its tendency and not enforceable by action: *Davison v. Seymour*, 1 Bosw. 88. See, also, *Bliss v. Matteson*, 52 Barb. 335.

In like manner a contract by a stockholder in a railroad company for a pecuniary consideration to procure the building of the terminus or depot, upon or opposite the land of the defendant, is illegal and void on account of its tendency to bias the judgment of the directors in a matter where they should consult solely the welfare of the company, and the convenience of the public: *Fuller v. Dame*, 18 Pick. 472; *Holladay v. Patterson*, 5 Oreg. 177.

A large number of cases illustrating the general principle of the principal case, but too numerous to be here cited, will be found in the note to *Collins v. Blanton*, 1 Smith's Lead. Cas. (8th Am. ed.) 741 *et seq.*

M. D. EWELL.

Chicago.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹

SUPREME COURT OF GEORGIA.²

SUPREME COURT OF ILLINOIS.³

SUPREME JUDICIAL COURT OF MAINE.⁴

COURT OF ERRORS AND APPEALS OF NEW JERSEY.⁵

ACCORD.

Note of Third Person for less Sum.—If a debtor gives and the cred-

¹ Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term, 1885. The cases will probably appear in 115 U. S. Rep.

² From J. H. Lumpkin, Esq., Reporter; to appear in 73 or 74 Ga. Rep.

³ From Hon. N. L. Freeman; to appear in 114 Ill. Rep.

⁴ From J. W. Spaulding, Esq., Reporter; to appear in 77 Me. Rep.

⁵ From John H. Stewart, Esq., Reporter; to appear in 40 N. J. Eq. Rep.

itor receives, in full satisfaction of the debt, a note endorsed by a third person for a less sum than the amount of the debt, it is a good accord and satisfaction to bar a subsequent suit by the creditor to recover the balance of the debt: *Varney v. Conery*, 77 Me.

ADMIRALTY.

Charter-Party—Penalty—Liquidated Damages.—The clause in a charter-party by which the parties mutually bind themselves, the ship and freight, and the merchandise to be laden on board, "in the penal sum of estimated amount of freight," to the performance of all and every of their agreements, is not a stipulation for liquidated damages, but a penalty to secure the payment of the amount of damage that either party may actually suffer from any breach of the contract; and is to be so treated in a court of admiralty of the United States, whatever may be the rule in the courts of the particular state in which the contract is made and the court of admiralty sits: *Watts v. Cumors*, S. C. U. S., Oct. Term 1885.

AGENT. See *Bills and Notes; Insurance.*

ASSIGNMENT.

Chose in Action—Oral Assignment.—To make an oral assignment of a debt due on account valid, as against creditors, or between parties even, there must be a valuable consideration therefor, and at least a symbolical or constructive delivery; although the delivery may be evidenced by a less significant act than is required for the assignment of a chose in action, which is capable of manual delivery like an execution, note or bond: *White v. Kilgore*, 77 Me.

ATTACHMENT. See *Exemption.*

BANK. See *Corporation.*

BILLS AND NOTES.

Consideration—Wagering Contract—Futures—Brokers—Bona fide Purchaser.—Contracts for the purchase and sale of cotton "futures" are illegal, and all evidences of debt executed on such consideration are void, even in the hands of a *bona fide* purchaser before due and without notice: *National Bank of Augusta v. Cunningham*, 73 or 74 Ga.

The payers of the note in question, being connected, in bringing about the transaction and carrying the same through, were *particeps criminis*, so, that their contract, growing out of an illegal transaction, was void: *Id.*

They could not recover for services rendered or losses incurred in forwarding the transaction: *Id.*

CONSTITUTIONAL LAW. See *Limitations, Statute of; Municipal Corporations.*

Power of State over Contracts of City with Gas Company.—A grant by the legislature of Louisiana, to a corporation, of the exclusive privilege, for a certain period, of manufacturing and distributing gas in the city of New Orleans, by means of pipes, mains and conduits, to such persons as might choose to contract for the same, upon certain condi-

tions, is a contract within the scope of the authority conferred by the constitution of the state and is binding upon the parties. While, in the exercise of its police power, the state may establish and enforce such regulations, not inconsistent with the essential rights granted in such a charter, as may be necessary for the protection of the public, yet she cannot, either by her organic law or legislative enactment, impair the obligation of the contract: *New Orleans Gas Co. v. Louisiana Light Co.*, S. C. U. S., Oct. Term 1885.

CONTRACT.

Right to Rescind—Custom—Evidence.—Where a purchaser of a lot of corn, to be delivered to him at a future time, agrees, as a part of the contract of sale, to make such advances from time to time as the seller may require, if the purchaser refuses to make an advance when demanded, except upon condition that the vendor shall give his note for the amount, the seller may rescind the contract, and refuse to deliver the corn: *Gilbert v. McGinnis*, 114 Ill.

Where a commercial contract is in any respect ambiguous, a particular custom or usage of trade known to the parties, or which, under the circumstances, they are presumed to know, or any previous course of dealing between them that will have a tendency to disclose the real intention of the parties, and to aid the court in arriving at the true construction, is admissible in evidence: *Id.*

Evidence of a particular custom or usage of trade is also admissible, for the purpose of engrafting, as it were, new terms into a contract, subject, however, to the qualification that such terms are not expressly or impliedly excluded by the express agreement. To have this effect the custom or usage must be reasonable, and not in conflict with any general rule of law: *Id.*

But it is not admissible to prove a custom or usage the effect of which will be to add to an express agreement a condition or limitation which is repugnant to or inconsistent with the agreement itself. Such evidence is never admitted to vary or contradict, either expressly or by implication, the terms of an agreement, written or verbal: *Id.*

In February a person agreed to sell to another a quantity of corn at a stipulated price per bushel, to be delivered in the months of August and September following, and the purchaser, as a part of the same agreement, promised to make advances on the contract to the seller of what money, he might, from time to time, require. It was *held*, in a suit upon the contract brought by the purchaser for non-delivery of the corn, that evidence that a custom or usage prevailed requiring the vendor to give to the vendee his note upon receiving any such advances, was not admissible in behalf of the plaintiff, as it was inconsistent with the express contract: *Id.*

Physician Practising without License—Right to Recover for Services.—The fact that a physician failed for a short time after December 1st 1881, to register under section 1409 *et seq.* of the code, is not sufficient to defeat his right to recover for professional services rendered after that date and before his registry, where it appeared that he was a regular practising physician, that he applied to re-register, and that he could not do so because the clerk had failed to prov-

he did register early in January thereafter as soon as he could do so: *Parrish v. Foss*, 73 or 74 Ga.

The case is distinguishable from stringent rules laid down in cases of sales of liquor and guano contrary to law: *Id.*

The services of physicians are necessary and called for upon pressing emergencies, and if this physician had applied for a mandamus against the clerk, his patients would have been compelled to wait, and he could not have obtained a registry sooner than he did actually register: *Id.*

Railroad—Control of by Ownership of Stock.—The Missouri Pacific Rd. Co. contracted with the Pullman Car Co. that the latter should have the exclusive right for a term of years to furnish sleeping cars on all passenger trains of the railway company, and "over its entire line of railway, and on all roads which it controls, or may hereafter control, by ownership, lease, or otherwise." The railroad company afterwards consolidated with other roads, forming a new corporation under the name of Missouri Pacific Rd. Co. Subsequently, the new company acquired a large majority of the stock of the St. Louis, &c., Rd. Co., and the two roads were operated under one management, though each road kept up its own corporate organization. *Held*, that the railroad of the St. Louis, &c., Rd. Co. is not controlled by the present Missouri Pacific Rd. Co. in such a way as to require that company to use Pullman cars over that road, even if the contract were binding on the new company, precisely as if the old company were still in existence, and standing in the place of the new. Though the Missouri Pacific Rd. Co., by owning a majority of stock of the St. Louis, &c., Rd. Co., may have all the advantages of a control of the road, yet that is not in law the control itself. Practically, it may control the company, but the company alone controls its road: *Pullman Car Co. v. Missouri Pac. Rd. Co.*, S. C. U. S., Oct. Term 1885.

CORPORATION.

Receiver when Appointed—Facts Necessary to be Shown.—Allegations in a bill that the company is insolvent and has suspended its business for want of funds to carry on the same, are not sufficient in a bill to have a corporation declared insolvent and a receiver appointed. The facts and circumstances must be set out from which the insolvency of the corporation shall appear: *The Newfoundland Railway Construction Co. v. Schack*, 40 N. J. Eq.

Section 34 of the corporation act (Rev. p. 182) authorizes the dissolution of a corporation before the time limited in the certificate of incorporation in its charter, by the resolution of the majority of the whole board of directors, at a meeting called for that purpose, on three days' notice to each director, and the consent of two-thirds in interest of all its stockholders, at a meeting of the stockholders convened upon notice, such consent being expressed in meeting, and being duly attested by its secretary and filed in the office of the secretary of state. The 57th section makes the directors of the corporation at the time of its dissolution its trustees to close up its business, pay its debts, and divide the surplus remaining among the stockholders. The 16th section authorizes the city of New Orleans, in the dissolution of a corporation, either to continue the persons as might be or to appoint a receiver for the corporation. *Held*,

that the power of the chancellor to interpose and take from the directors the power to close up the business of the corporation and to put its affairs in the hands of a receiver, is a discretionary power to be exercised only on good cause shown, upon circumstances disclosed by the proofs which show the need of the interference of the court for the protection of creditors or stockholders from breaches of trust by the directors in the performance of their duties: *Id.*

Directors—Liability for Mismanagement—Statute of Limitations.—

The managers of a savings bank stand in the relationship of trustees to the depositors, so that the statute of limitations will not be a bar against a charge of mismanagement on their part, which had occurred more than six years before the filing of the bill: *Williams v. McKay*, 40 N. J. Eq.

Although such managers are unpaid, they are to be held liable for the want of ordinary care and diligence in the management of the affairs of the institution: *Id.*

When the bill shows a long and systematic violation of the directions of the charter by the president and committee-men, it is a *prima facie* presumption that such course of misconduct was known to the managers, and the latter cannot demur to the bill on the ground that such misconduct is not traced to them: *Id.*

COVENANT.

Private Road—Encroachment—Injunction—Statute of Limitations.

—In 1859 L. conveyed a tract of land to S., by a deed containing a covenant that L., his heirs and assigns, would thereafter keep open a private road, two rods wide, from the public road to the rear of the lands conveyed, and directly south thereof. L. then also owned the land southward. S.'s land now belongs to complainant, and L.'s to defendant, their respective conveyances containing the covenant; *held*, that complainant could enjoin defendant from encroaching on the private road by erecting piazzas, fences, &c., and that he was not estopped by knowledge of defendant's intention to build the structures and of their subsequent erection, and offered no resistance; and that the statute of limitations was no defence; *Gawtry v. Leland*, 40 N. J. Eq.

CRIMINAL LAW.

Evidence of Distinct Acts—Election.—Where several witnesses testified to distinct beatings given the wife by the husband, at no great intervals apart, but all within two years before the indictment was found, no two of the witnesses testifying to the same cruel treatment, it was error for the court to compel the state to elect one of these transactions on which it would rely, and when the election was made, rule out all the evidence in relation to the others: *Member v. The State*, 73 or 74 Ga.

Insanity—Burden of Proof.—A request to charge that the prisoner's sanity must be shown by the same amount of proof that is required to establish guilt in all other cases, that is to the exclusion of all reasonable doubt, was properly refused: *Danforth v. State*, 73 or 74 Geo.

The rule is that, in criminal as well as in civil cases, insanity should be established by a preponderance of testimony: *Id.*

Reasonable Doubt.—The law does not require that the jury shall believe that every fact in a criminal case has been proved beyond a reasonable doubt, before they can find the accused guilty. The reasonable doubt the jury is permitted to entertain must be as to the guilt of the accused on the whole evidence, and not as to any particular fact in the case: *Davis v. The People*, 114 Ill.

DAMAGES.

Bond—Penal Sum—Liquidated Damages—Barber-shop.—Where a bond in the usual form was given in the sum of five hundred dollars, conditioned that the obligor should never open and keep a barber-shop within a certain town, the sum named will be regarded as a penalty and not as liquidated damages: *Burrill v. Daggett*, 77 Me.

In such cases, the intention of the parties is to govern, and for that purpose it is necessary, 1. To look at the whole instrument; 2. Its subject-matter; 3. The ease or difficulty in measuring the breach in damages; 4. The magnitude of the stipulated sum, not only as compared with the value of the subject of the contract, but in proportion to the probable consequences of the breach: *Id.*

DEBTOR AND CREDITOR.

Fraudulent Conveyance—Secret Trust for Grantor—Subsequent Creditors.—A person being in debt, conveyed his real and personal property to his son, under an agreement made for the purpose on the part of both, to defeat, hinder and delay a creditor in the collection of his debt, no consideration being paid therefor, and with a secret understanding that the son should hold the property for the use and benefit of the father, and reconvey it to him when requested; and if the father did not require a reconveyance, the son to take care of him and provide him with necessities during his life, and have the property at his death. It was held, the sale and conveyance were fraudulent and void as to creditors of the father: *Gordon v. Reynolds*, 114 Ill.

Even where the grantee pays a valuable consideration, if a part of the consideration is an undertaking and promise by the grantee to support and take care of the grantor, such an agreement renders the transfer void as to then existing creditors of the grantor: *Id.*

If the fraudulent grantor reserves no future use or benefit in the property, then the transfer can be attacked only by pre-existing creditors; but where the conveyance is merely colorable, and a secret trust exists for the benefit of the grantor, then the sale is void, both as to precedent and subsequent creditors: *Id.*

Purchase by Insolvent—Fraud—Bill in Equity—Parties.—Where one purchases goods, being insolvent and not intending to pay for them, and conceals his insolvency and his intention not to pay, he is guilty of a fraud which entitles the vendor, if no innocent third party has acquired an interest in them, to disaffirm the contract and recover the goods: *Johnson v. O'Donnell*, 73 or 74 Ga.

The bill shows that the plaintiff's goods were purchased by O'Donnell & B., and have been fraudulently transferred to other defendants in the bill. The subject-matter is the goods of plaintiffs, and to avoid a multiplicity of suits, a court of equity would have jurisdiction, there being no objection of multifariousness or misjoinder of defendants: *Id.*

DECEDENTS' ESTATES.

Sale for Payment of Debts—Power of Court—Adverse Title.—In a proceeding by an administrator for leave to sell land to pay debts, the court, exercising but a mere statutory authority, has no jurisdiction to settle and determine conflicting titles to the land, or to remove clouds upon title. If the paramount owner of the land is made a defendant, it would doubtless be his duty to assert his rights to the same in his answer; not for the purpose of forming an issue to be tried in that proceeding, but for the purpose of giving notice of his rights, and thus prevent an estoppel *in pais*: *Harding v. LeMoine*, 114 Ill.

As a necessary incident to the power to make the sale, the court must also determine whatever questions may arise in respect to the payment of the purchase-money or the sufficiency of the conveyance, and, in short, all questions relating to the sale. In respect to the land, the court can find only the fact that the deceased had title or a claim to the same, and the sale will be subject to all adverse independent claims of title: *Id.*

The court, whether the circuit or county court, under whose decree an administrator sells land to pay debts, has no right or authority of law to enter an order requiring the delivery of possession to the purchaser by parties claiming an independent title thereto. The purchaser must establish his right to the possession by an action in a court of law where legal titles are cognisable: *Id.*

DEED. See *Covenant*.

Escrow—Effect of Delivery to the Grantee.—There cannot be a delivery of a deed to the grantee *in escrow*. Such delivery makes the deed an absolute one to the grantee: *Stevenson v. Crapnell*, 114 Ill.

Mill-dam.—A deed, wherein the grantor gives, grants, bargains, sells and conveys unto the grantee, his heirs and assigns forever, the right of having, building and maintaining, and repairing, and keeping in repair a dam on certain premises, with the right to so much of the premises as may be necessary on which to build and maintain the dam with its wings, conveys a fee in the land upon which the dam stands: *Inhabitants of Monmouth v. Plimpton*, 77 Me.

DOMICILE.

Residence—Minor—Pauper—Settlement.—That a minor daughter should depart from home for temporary employment, leaving such articles of clothing and bedding as she did not require for use, even though she receive the wages for her labor for her own use, is not so uncommon an occurrence as to authorize an inference of such a change in the parental and filial ties as to constitute emancipation: *Inhabitants of Searsmont v. Inhabitants of Thorndike*, 77 Me.

When the home of a person is once established in a town it requires less proof to show continuance there than would be necessary to show both the establishment and continuance. Bodily presence at all times is not necessary to show continuance. The departure for a purpose in its nature temporary, leaving behind articles not required for immediate use, expressing an intention to return, and returning to visit, and to repair wardrobe, and on account of sickness, are sufficient evidence of the continuance: *Id.*

DOWER.

Division of Land by Partition—Separate Suits.—Where land in which a widow is entitled to dower has been divided, by partition, between several different parties, she may properly bring a separate suit against the owner of each portion. She may perhaps proceed against all in one suit, but she is not compelled to do so: *Coburn v. Herrington*, 114 Ill.

EJECTMENT.

Ownership in Second Story of Building.—Certain persons were permitted to build a public hall as a second story of a new school-house, and an agent, authorized by the district, leased that second story to the builders of it, with necessary easements of ingress and egress, and with equitable provisions as to the use, repair of the building, &c., "so long as the building shall stand." The building in its several parts was occupied in accordance with the agreement for nearly thirty years, when the district voted "to sell the school-house and lot under" the hall, and by deed their agent conveyed all their interest in the lot and building thereon. In a real action by the grantee against the occupants of the hall, *Held*, 1. That the title to the hall was never in the district, it accrued to the builders before the execution of the instrument, called a lease, by virtue of their having built it under a license from the district, and the purpose of the paper was to regulate the use and manner of using the hall. 2. That these regulations applying to the use, were not conditions of a grant, for there was no grant, hence the remedy for a breach would not be a forfeiture. 3. That there could be no forfeiture without an entry, and the deed from the district conveyed no such right, nor had the district made any such entry. 4. That the vote to sell did not authorize a conveyance of the hall, and the deed could go no further than the authority. 5. That the defendants, having disclaimed all but the hall with its easements, and being in possession of that, have a color of title, and the plaintiff had failed to show a better one: *Peaks v. Blethen*, 77 Me.

EQUITY. See *Debtor and Creditor*; *Decedent's Estates*; *Insurance*; *Partition*.

Parties—Trustee and Cestui que Trust—Receiver.—A receiver filed a bill in his own name to foreclose a mortgage made to A. in trust for B. To establish his right to foreclose, the bill relied on a decree of the court of chancery appointing him receiver. It not appearing by the recitals of the bill that the decree transferred to the receiver the legal title which A., as trustee, had in the mortgage: *Held*, that A. was a necessary party to the bill: *Tyson v. Applegate*, 40 N. J. Eq.

Further recitals in the bill justified the conclusion that the decree divested B. of her interest in the mortgage, and vested that interest in three persons named in the bill. *Held*, that B. was not a necessary party, but that the three persons in whom her interest was vested were necessary parties to the bill: *Id.*

The rule that to a bill to foreclose a mortgage made to a trustee in trust, the *cestui que trust*, as well as the trustee, shall be made a party, is to be observed when the *cestuis que trustent* are known, and are not so numerous as to make it impossible or highly inconvenient to include them as parties: *Id.*

Specific Performance—Contract for Sale of Lands—Tender—Parol Evidence.—It is not essential to the enforcement of a contract for the sale of lands that it should be signed by the complainant, as well as by the defendant: *Carskaddon v. Kennedy*, 40 N. J. Eq.

A contract induced by fraudulent representations would not be enforced in equity, even though it appeared that the parties did not intend to make the representations a part of the contract: *Id.*

If a party refuse a tender of the purchase-money for land sold, on the express ground that he is not bound to make any conveyance, he cannot, afterwards, object to the propriety of the tender, on the ground that the description of the land, in a deed which the purchaser, at the time of the tender, requested him to execute, was erroneous: *Id.*

Oral evidence is not competent to establish an agreement to change the description of land previously bargained for by a written contract signed by the vendor: *Id.*

EVIDENCE.

Public Records—Sworn Copy.—The contents of a public record may be proved by the production of the record itself, or by a copy duly certified by the proper officer, or by an examined copy sworn to by an unofficial witness who made the examination: *State v. Lynde*, 77 Me.

Power of Court to Strike out.—Where, in a suit brought by the representatives of a deceased person, the testimony of the living defendant concerning conversations and transactions had with the decedent is admitted without objection, it is not in the power of the court afterward to strike it out because its admission is opposed to the statute. The court can strike out testimony so admitted only when its exclusion is demanded by some consideration of public policy: *Rowland v. Rowland*, 40 N. J. Eq.

Averments in another Suit on Information and Belief.—Averments made under oath, in a pleading in an action at law, are competent evidence in another suit against the party making them; and the fact that the averments are made on information and belief goes only to their weight, and not to their admissibility as evidence: *Pope v. Allis*, S. C. U. S., Oct. Term 1885.

EXEMPTION.

Waiver of—Invalidity.—A general waiver of exemption of wages from the process of garnishment, extending indefinitely to all the future wages of the laborer, is void and cannot be enforced against the promissor: *Green v. Watson*, 73 or 74 Ga.

Whether a special waiver upon specific wages in a certain employment, and for a certain time by specific orders on employers containing such specific waiver, we do not decide: *Id.*

FRAUD. See *Debtor and Creditor; Sale.*

FRAUDS, STATUTE OF.

Promise to Pay the Debt of Another—New Consideration.—Where the moving consideration for the promise to pay money is the liability of a third person, the promise must be in writing; but if there is a new

consideration moving from the promisee to the promisor, then the super-added consideration makes it a new agreement, which is not within the Statute of Frauds: *Power v. Rankin*, 114 Ill.

So where a party having a chattel mortgage upon a lot of corn, to secure a note of some \$1200, relinquishes the same, and allows the corn to be sold and delivered by his debtor, in consideration that an agent, in whose hands \$1000 was placed, had agreed to pay him that sum when the corn should be delivered, it was *held*, that the verbal promise to pay the holder of the chattel mortgage was not within the Statute of Frauds, and that an action would lie for a failure to make the payment: *Id.*

Reserving a Verbal Trust by a Grantor.—An express trust between the grantor and grantee of land, that the grantee is to hold the land in trust for the grantor, or is to reconvey to him in a certain contingency, is invalid, under the Statute of Frauds, unless evidenced by some writing signed by the grantee: *Stevenson v. Crapnell*, 114 Ill.

Resulting Trust—When it Arises.—Where there is an express trust, there cannot be a resulting or implied trust; and in case of a voluntary conveyance, no resulting trust can arise in favor of the grantor: *Stevenson v. Crapnell*, 114 Ill.

HABEAS CORPUS.

Removal of, into United States Court.—A writ of *habeas corpus* is not removable from a state court into a circuit court of the United States, under the Act of March 3d 1875, c. 137, sect. 2: *Kurtz v. Moffitt*, S. C. U. S., Oct. Term 1885.

HUSBAND AND WIFE.

Conveyance—Attachment and Levy.—The statute prohibiting conveyances by the wife, without the joinder of her husband, of such real estate as has been directly or indirectly conveyed to her by her husband, does not include transfers by attachment and levy for the satisfaction of her debts. Such real estate is liable to attachment and levy by her creditors: *Virgie v. Stetson*, 77 Me.

INSURANCE.

When in the Nature of a Wager.—It would seem that a policy or certificate for the payment of a premium to one who may hold a number next to that held by the one who dies, and solely because he does die, makes the transaction in the nature of a wager upon the life of one in whom the party thus benefited has no interest, and is therefore illegal: *The People v. Golden Rule*, 114 Ill.

Agency—Broker—Evidence.—A party desiring to insure certain property, applied to an insurance agent of his place to procure the insurance, leaving him to select the company. He forwarded the application to certain insurance brokers in Chicago, who procured the policy in a company with which they had considerable dealing, and sent the same to the assured through the first named agents, and he sent the premium to the agents in Chicago, who never forwarded the same to the insurance company. The policy contained the usual clause that it should not be binding until the actual payment of the premium. A loss occurred, and

payment was refused, when suit was brought on the policy, and a recovery had: *held*, that the liability of the insurance company depended upon the fact whether the Chicago agents were its agents, or were authorized to receive payment in its behalf: *Sun Mut. Ins. Co. v. Saginaw Barrel Co.*, 114 Ill.

Where insurance brokers procuring a policy of insurance received payment of the required premium, and failed to return the same to the insurance company, it was held that the correspondence between the brokers and the company was proper evidence for the purpose of showing their previous relations and methods of business, in respect to insurance effected through them, and as tending to show they were, in fact, agents of the company, and as such authorized to receive payment of the premium: *Id.*

Mutual Benefit Association—Power of Chancery to enforce Contract.

—A mutual benefit association, a corporation not organized for pecuniary profit, having no surplus, and relying entirely upon mortuary assessments made upon each death of a member for the payment of benefits to the beneficiaries of decedent, gave a certificate of membership to a member, in the sum of \$5000, whereby it promised, upon proof of his death, that an assessment should be levied upon the surviving members to the amount of the certificate, which sum, when collected, less the expenses and collection costs, it would pay to his devisees, in case he left any, and if he left none, to his legal heirs. It was *held*, that a court of chancery might properly take jurisdiction of a bill brought by the heirs of the deceased member to enforce payment of the certificate, by compelling a specific performance of the contract: *Benefit Association v. Sears*, 114 Ill.

JUDICIAL SALE. See *Decedents' Estates*

Default of Purchaser—Resale—Right to recover Deposit.—A judicial sale was made upon the conditions that the purchaser was required to pay down ten per cent. of his bid, and pay the remainder at a certain time; that if any purchaser should not comply with the conditions, then the property would be offered for sale a second time, and that the first purchaser would not be benefited by any advance, but would be held liable for all loss and expense incurred thereby. A. purchased a lot, paid ten per cent. of his bid, and failed to pay the remainder. The lot was resold for a sum in excess of the first amount sufficient to pay the interest on the first bid and the expense of the second sale; *held*, that the first purchaser was entitled to be repaid the ten per cent.: *The Chancellor v. Gummere*, 40 N. J. Eq.

LANDLORD AND TENANT.

Rent received in Cotton—Right of Landlord to enter and pick Cotton.—The landlord, having rented his land for a certain number of pounds of cotton, had no right to enter, pick and remove the cotton, against the will of the tenant, though the cotton was wasting and likely to be destroyed: *Wadley v. Williams*, 73 or 74 Ga.

The title to the crop was in the tenant; the landlord had only a lien thereon: *Id.*

The relation of landlord and tenant existed in this case. The land was let to the defendant in error for a fixed rent to be paid therefor out of the crop. The contract was not a mere cropping agreement: *Id.*

LIMITATIONS, STATUTE OF. See *Corporation; Covenant*.

Constitutionality of—Repeal of.—There is a clear distinction between the effect of statutes of limitation in vesting rights to real and personal property, and their operation as a defence to contracts. Where the question is as to the removal of the bar of the statute of limitations by a legislative act, passed after the bar has become perfect, such act, in the former case, deprives the party defendant of his property, without due process of law; because, by the law in existence before the repealing act, the property had become his; but in the latter case, it merely takes away a purely arbitrary defence to an action, which falls with the repeal of the law on which it depended; and such a defence is not a right of property which is protected by the fifteenth amendment to the Constitution of the United States: *Campbell v. Holt*, S. C. U. S., Oct. Term 1885.

MASTER AND SERVANT.

Fellow-Servants—Who are.—Servants of the same master, to be co-employees or fellow-servants, so as to exempt the master from liability on account of injuries sustained by one resulting from the negligence of the other, must be such as are directly co-operating with each other in a particular business; that is, the same line of employment; or such that their usual duties shall bring them into habitual consociation, so that they may exercise a mutual influence upon each other promotive of proper caution: *Rolling-Mill v. Johnson*, 114 Ill.

The relations of the servants must be such, that each as to the other, by the exercise of ordinary caution, can either prevent or remedy the negligent acts of the other, or protect himself against its consequences. Where there is no right or no opportunity of supervision, or where there is no independent will, and no right or opportunity to take measures to avoid the negligent acts of another without disobedience to the orders of an immediate superior, the doctrine exempting the master can have no application: *Id.*

MINES AND MINING.

Title to Mineral Lands, how obtained from the United States.—No title from the United States to land known at the time of sale to be valuable for its minerals of gold, silver, cinnabar, or copper, can be obtained under the pre-emption or homestead laws, or the town-site laws, or in any other way than as prescribed by the laws specially authorizing the sale of such lands, except in the states of Michigan, Wisconsin, Minnesota, Missouri and Kansas: *Deffebach v. Hawke*, S. C. U. S., Oct. Term 1885.

It would seem that there may be an entry of a town-site, even though within its limits mineral lands are found, the entry and the patent being inoperative as to all lands known at the time to be valuable for their minerals, or discovered to be such before their occupation and improvement for residences or business, under the town-site title.: *Id.*

MORTGAGE.

Liability of Purchaser of Real Estate subject to—Extension of Time of Payment by Agreement with Purchaser.—A. purchased real estate

from B., subject to the payment of a mortgage thereon to C. *Held*, that even though A. had expressly promised B. to pay the mortgage debt, this would not, without the consent of C., convert B. from a principal debtor to a surety. 2. The relation of principal and surety not existing between A. and B., an extension of the time of payment of the mortgage debt granted by C. to A. would not discharge B. from his liability to C. (It did not appear in this case whether or not B. was prejudiced by the extension of time for paying the mortgage debt, through depreciation in the value of the property on which it was secured): *Shepherd v. May*, S. C. U. S., Oct. Term 1885.

MUNICIPAL CORPORATION. See *Taxation*.

Police Powers.—Closing Places of Business on Sunday.—Cities and villages incorporated under the general Incorporation Act, giving power “to regulate the police of the city or village, and pass and enforce all necessary police regulations,” may pass an ordinance prohibiting persons from keeping open their places of business in such city or village, for the purpose of vending goods, wares and merchandise on Sunday, and provide a penalty for a violation of the same: *McPherson v. Village of Chebanse*, 114 Ill.

The police regulations of a village may differ from those of the state upon the same subject, if they be not inconsistent therewith. A village ordinance prohibiting the keeping open of places of business on Sunday, for the sale of goods, etc., is not inconsistent with the provisions of section 261 of the Criminal Code: *Id.*

Subdivision 66 of section 62, article 5, of the “Act to provide for the incorporation of cities and villages,” which reads that the city or village council shall have power “to regulate the police of the city or village, and pass and enforce all necessary police regulations,” is not limited in its application to the organization and regulation of a police force, but may extend to and embrace a subject-matter of police regulation, under the general police power of the state: *Id.*

NEGLIGENCE. See *Master and Servant*.

Minor—Contributory Negligence—Railroad—Absence of Flagman.—Where there is no evidence of the want of capacity or discretion in a minor plaintiff suing a railway company for a personal injury from negligence, and he is present at the trial, and it appears that he was of such age and ability to care for himself as to be trusted by his parents to attend school in a large city, a considerable distance from home, and to go and return by himself, it was held error to instruct the jury that if believed, from the evidence, that the plaintiff, at the time and place of the injury, was of such tender years, and was so immature, that the requisite capacity to exercise proper care was wanting, then the law would not impute negligence to him. While the same degree of care might not have been required of him as from a person of mature years, it cannot be said that no negligence could be attributed to him: *Chicago, R. I. and P. Rd. Co. v. Eininger*, 114 Ill.

In a suit by a plaintiff, against a railway company, to recover for an injury received from a passing train at a public street crossing—not in attempting to cross the track along the street, but while unlawfully walking along the track as a footway—it was held error to instruct the jury

that if the injury happened because of there being no flagman at the railroad crossing to give warning to those about to cross the street and railroad track at the approach of train at the crossing, contrary to a city ordinance, then the plaintiff was entitled to recover: *Id.*

A requirement of a railway company to keep a flagman at a public street crossing in a large city, to give warning of the approach of trains, is intended for the protection of persons crossing the railroad tracks at such crossing, and not for the benefit of persons walking along the railroad track, employing it as a foot-path. To the latter the company does not owe the duty in respect to a flagman: *Id.*

Railroad—Arson—Contributory Negligence—Burden of Proof.—In order to support a recovery against a railroad corporation on account of an injury, or death, caused by a collision with its train at a crossing, whether the action be in form civil or criminal, it must affirmatively appear: 1. That the defendant corporation was guilty of negligence. 2. That its negligence was the cause of the accident. 3. That the injured party was in the exercise of due care and diligence at the time of the injury, or at least, that the want of such care on his part in no way contributed to produce it: *State v. Maine Central Rd. Co.*, 77 Me.

It is not enough to show that the defendant was negligent: *Id.*

It is incumbent on the prosecuting party to go further, and directly or indirectly, by affirmative proof satisfy the jury that no want of due care on the part of the injured party, helped to produce the accident: *Id.*

It is negligence to attempt to cross the track of a railroad without looking and listening to ascertain if a train is approaching, and ordinary sense, prudence and discretion require this of a traveller so far as he has an opportunity so to do: *Id.*

It is still greater negligence for one seeing and hearing a train approaching at ordinary speed to attempt to cross directly in front of it: *Id.*

PARTITION.

Defence of Equitable Title—Practice.—In a suit for partition in chancery, where a defendant sets up an equitable title to the whole estate in the premises, or impeaches the complainant's title on equitable grounds, the court will not suspend the suit until the title be settled, but will pass upon such title and settle all disputes concerning it in the partition suit, and grant relief accordingly: *Read v. Huff*, 40 N. J. Eq.

Where a husband pays the consideration of the purchase of lands, and has the conveyance made to his wife, the presumption is that a gift or settlement was intended, and a resulting trust will not arise in his favor from such payment: *Id.*

The proof which in such cases shall overcome the presumption of a gift to the wife must be of facts antecedent to or contemporaneous with the purchase, or else immediately afterwards, so as to be in fact part of the same transaction; and it must be equally satisfactory and explicit with the proof required to establish a resulting trust: *Id.*

PARTNERSHIP.

What constitutes.—Where M. was to conduct a saw-mill, pay its expenses from the proceeds and divide the net profit with two others,

and it further appears that the two others and himself jointly owned the mill property itself, there was clearly a partnership between the parties: *Camp v. Montgomery*, 73 or 74 Ga.

The weight of authority and reason seems to be decidedly in favor of the rule that there may be a legal and valid partnership although one or more of the parties are guaranteed by the others against loss. And notwithstanding the last clause of section 1890 of the Code, that a "common interest in profits alone does not constitute a partnership," the rule is the same in this state: *Id.*

If parties go into an adventure, one furnishing money or stock and the other skill or labor, and to share the net profits, they are partners, since they have a joint interest in the profits as contradistinguished from the common interest. *A fortiori* is there a partnership where, in addition to this, there is a joint interest in the property used: *Id.*

RAILROAD. See *Contract*; *Negligence*.

RECEIVER. See *Corporation*; *Equity*.

SALE.

Misrepresentation.—Four hundred and ten shares of the stock of an electric light company, recently organized, were paid for to the company by its stockholders, at the rate of one-third of the par value of one hundred dollars a share. The plaintiff sold five of his shares, thus paid for, to the defendant at par, representing that all stockholders had paid for their shares at par. *Held*, that the plaintiff's statement was a misrepresentation of a material fact; that the defendant would have the right to infer from the representation that the company had assets of forty-one thousand dollars, instead of assets of only one-third of that amount: *Coolidge v. Goddard*, 77 Me.

SHIPPING.

Earnings—Action by Part Owners.—Tenants in common must join in an action to recover the earnings of their vessel unless there is an excuse for a severance of the claim; but bankruptcy of one owner is not an excuse: in such case the assignee of the owner who is in bankruptcy must be joined with the solvent owners, or, if an assignee has not been appointed when the suit is commenced, an action may be supported in the names of the bankrupt and other owners until an assignee comes in: *Stinson v. Fernald*, 77 Me.

SPECIFIC PERFORMANCE. See *Equity*.

TAX.

Public Buildings of Municipal Corporation.—Buildings and other property owned by municipal corporations and appropriated to public uses, are but the means and instrumentalities used for municipal and governmental purposes, and are, therefore, exempt from general taxation, not by express statutory prohibition but by necessary implication: *Inhabitants of Camden v. Camden Village*, 77 Me.

A village corporation was authorized by its charter to raise money to defray the expenses of a night watch, police force, fire department, &c., and also to erect a hall. The building thus erected contained a public

hall, police court room, assessors' office, lock-up, &c , and, when not in use for meetings and for purposes of the corporation, the hall and other rooms were let for hire, and the money received therefrom was used towards paying the expenses of the corporation. *Held*, that the building and lot were not liable to taxation by the town in which they were situated. *Id.*

TRUST. See *Frauds, Statute of.*

Resulting Trust.—The title to a house and lot was taken in 1852 in the name of one R., but the consideration was paid by one D., who, with his family, continuously occupied the premises thereafter until his death, and paid the taxes thereon and for all improvements and repairs, without accounting for the rents to R., or being called on by R. to do so. R., at the request of D., afterwards conveyed the premises to C., who was D.'s daughter by a former wife. *Held*, that D. had a resulting trust in the premises, and that his wife, the respondent, was entitled to dower therein : *Mershon v. Duer*, 40 N. J. Eq.

TAX AND TAXATION.

No Collector—Power of Court of Equity to Appoint Person to Collect the Taxes.—Where the proper officers of a county or town have levied a tax for the satisfaction of judgments against it, and no one can be found to accept the office of collector, a court of equity has no jurisdiction to fill that office or to appoint a receiver to perform its functions : *Thompson v. Allen Co.*, S. C. U. S., Oct. Term 1885.

USURY.

Parol Evidence—Agreement to Pay Taxes.—The general rule that parol evidence is not admissible to change the terms of a written contract, has its exceptions, as, in respect to the consideration expressed in notes and conveyances. Such evidence is also admissible where usury is pleaded, regardless of the form the transaction may have in the writings executed by the parties : *Kidder v. Vandersloot*, 114 Ill.

A person borrowed \$2500 on several years' time, and to secure its payment, with interest, conveyed to the lender eighty acres of land, taking back a written contract for a reconveyance on payment of the principal and ten per cent. interest annually, that rate being the highest then allowed by law to be contracted for, with \$20 yearly for taxes on the land, making \$270 annually, and the proof showed that only \$250 was in fact paid as interest, and that on payment of that sum, and producing a receipt for the taxes of such year, he was credited with \$270. It was held, the transaction was not usurious, and that the \$20 was but a guaranty for the payment of the taxes, which were chargeable against the mortgagee by reason of the legal title being in him : *Id.*

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TESTAMENTARY PROVISIONS AS AFFECTED BY THE RULES OF PRIVATE INTERNATIONAL LAW.

Plaisante justice qu'une rivière ou un montagne borne.—PASCAL.

SECT. I. INTRODUCTORY.

MUNICIPAL laws cannot *proprio vigore* have any extra-territorial bearing or effect. This limitation of their scope leaves two classes of cases unprovided for : First, cases arising between states having no common superior ; secondly, cases where the subjects of one state have rights or obligations which are questioned or impaired in another. The first class of cases is settled by the Public International Law, a set of rules emanating from common agreement in practice, or the original compacts of states. And to determine before the courts of what state a case of the second class is to be heard, and by the law of what state determined, is the special province of International Private Law. This system consists of rules of interstate comity, affecting to regulate the rights and acts of persons as depending on a diversity of laws and jurisdictions. It acknowledges the binding force of municipal laws, and its problem is to ascertain the principles on which such laws, as such, are binding between members of different states ; and to determine which municipal law is, by those principles, to be applied in a particular case : Westlake, *Priv. Int. Law*, ch. 11. If a decedent, domiciled in one state, has left a will disposing of personalty at home, and realty situate in a foreign or sister state, questions may arise as to his capacity, the solemnities of the execution of the will, or the validity of its dispositions ; and when such questions do arise

a problem of practical difficulty is presented : where and how are they to be determined ? When, therefore, a set of facts has to be regulated in accordance with law, two questions of capital importance are at once presented for solution : First, what state has jurisdiction to apply the law ? And, secondly, what law will it apply ? The former of these questions is said to relate to the proper *forum* ; the latter to the appropriate *lex* : Holland, Jurisprudence 305. We will now consider these in order.

SECT. II. THE PROPER FORUM.

A. CASES RELATING TO PERSONALTY.

As a general rule, the court of the domicile is the proper forum in which to raise questions in wills of personalty, even though the property be situate in another state : *Gilman v. Gilman*, 52 Me. 165. The court of the domicile, it is said, is the *forum concursus* to which the legatees under a will of a testator or the persons entitled to the distribution of an estate of an intestate are bound to resort : *Enohin v. Wylie*, 10 H. L. Cas. 1. The apparent violation of sovereignty implied in the action of one state assuming to regulate the disposition of property in another, is eliminated by the fiction *mobilia sequuntur personam* ; by which, though the movables are in point of fact within the territory of a different state, yet in contemplation of law they are considered as having followed him to the place of his last domicile. The general rule is, however, subject to the limitation that, for certain purposes, the *forum rei sitæ* may also take cognisance of the will ; as, for example, to construe the will for the direction of ancillary administrators : *Parsons v. Lyman*, 20 N. Y. 103 ; or to try the validity of foreign bequests, where the title to the bequeathed property is claimed by a citizen of a foreign state : *Burbank v. Payne*, 17 La. Ann. 15. Upon the death of a person leaving property in two or more states or countries, his property in each is considered a separate succession for the purposes of administration, the payment of debts, and the decision of claims of parties asserting title to the property. So Lord KAMES : " In a legal view, a movable situated within a certain territory is subjected to the judge of that territory ; and every action claiming the property or possession of it must be brought before that judge, as no other judge has authority over it : " Kames, Principles of Equity, B. 3, c. 8, sect. 3. We have, therefore, the fiction that the domicile draws to it the personal estate wherever it

may chance to be; but the fiction yields whenever, for the purposes of justice, the actual *situs* of the property should be examined: *Green v. Van Buskirk*, 7 Wall. 139.

B. CASES RELATING TO REALTY.

The exclusive right of the sovereign to command within its own territory, and the intimate relation which feudalism established between the sovereignty of the territory and the lordships of the soil, furnish the basis for the exclusive claim of the courts of the *locus rei sitæ* to entertain suits respecting the realty. The rights of the ownership of land receive the protection of the state where the land lies, and of no other; and the protection of these rights draws with it the just claim to regulate them. Moreover, no state, by its laws, can affect to regulate the rights respecting immovables in another state, since it cannot enforce its own decree without a violation of the foreign territorial sovereignty. These two grounds concur to sustain in reason the claim of the courts of the *situs*.

An incidental effect of this rule is, that it becomes necessary for an executor of a decedent, who has left land in two or more states, to take out letters in each state. For by taking out letters in one state, he becomes an officer of its courts, and as such, cannot sue (*Morrell v. Dickey*, 1 Johns. Ch. 153; *Noonan v. Bradley*, 9 Wall. 394), or be sued (*Vaughan v. Northup*, 15 Pet. 2; *Caldwell v. Harding*, 5 Blatch. 50), in another state without becoming an officer of its courts also.

There is, however, an exception to the general rule that the *forum rei sitæ* possesses exclusive jurisdiction when the judgment of a foreign court would act *in personam*, as *e. g.*, in an action of specific performance against a foreign executor found within the jurisdiction. The process, in such case, would operate against him alone, and in no wise affect the foreign state: *Massie v. Watts*, 6 Cranch. 148.

SECT. III. THE APPROPRIATE LEX.

A. CASES RELATING TO PERSONALTY.

1. *As to Testamentary Capacity.*—The modern Roman law and the common law, divergent as they often are in questions of the conflict of laws, agree in the rule that the law of the actual domicile of the testator at the time of his death, governs on the point of his legal capacity to make a will: Savigny Pr. Int. Law 137; *Schultz*

v. *Dambman*, 3 Bradf. 379; *Cath. Roberts's Will*, 8 Paige Ch. 525; Whart. Conf. of Laws, sect. 570. If, therefore, the age of capacity differs in two states, and an individual makes a will valid by the laws of one, and subsequently acquiring a domicile in the other, dies before reaching the testamentary age according to that law, he would die intestate. The rule that he must be of testamentary age by the law of the domicile at the time of his death is inflexible: the rule *locus regit actum* cannot modify it: Fœlix, Droit International Privé. So, also, if a married woman is incapacitated to make a will by the law of her domicile at the time of her death, it will avail nothing that she made a will in a former domicile where she had such capacity: Story Conf. of Laws, sect. 70. Likewise, in our practice the jurisdiction in which wills of movables are litigated on the issue of sanity, is that of the decedent's last domicile; and the question is, whether by the law of that domicile the testator had a disposing mind: Whart. Conf. of Laws, sect. 574. And when the courts of the *forum situs* claim to decide the question of domicile (usual practice), they do not depart from the principle, but show that they hold it inviolable.

The stringency of the common-law rule in this regard has been departed from in England (24 & 25 Vict. c. 107), and many of our states (*e. g.*, New York, Code Civ. Proc., sect. 2612), so that now no change of domicile, under the laws of such states, avoids or affects a will, valid by the law of the domicile at the time of its execution: Whart. Conf. of Laws, sect. 570.

2. *As to Forms and Solemnities of Execution.*—On the question what law shall determine the validity of the execution of a will, there is a conflict between the jurisprudence of the continent and the common law of England. The former allows an option of conformity to the *lex loci actus*, or the *lex domicilii*, on the ground, according to Savigny, that "the object of law is to favor and facilitate, not to thwart the act of the party:" XXXVIII., sect. 381. Early opinion on the continent, however, was in favor of the *lex domicilii* governing. Vattel lays down the rule that the validity of a testament, as to its form, can only be decided by the judge of the domicile, whose sentence ought to be everywhere acknowledged: Law of Nations, B. 2, sect. 85. The common law of England accords with the earlier continental view; and is rigorous in the requirement that the forms and solemnities required by the law of the domicile at the testator's death be complied with: *Stanley v.*

Bernes, 3 Hagg. 374; *Grattan v. Appleton*, 3 Story 755; *Whicker v. Hume*, 7 H. L. Cas. 124; *Crocker v. Marquis of Hertford*, 4 Moore Priv. Council Rep. 339; 10 Id. 361. Accordingly a will made in one state in compliance with the formalities there required, by one who subsequently becomes domiciled and dies in another state, is not valid unless conformable to the formalities prescribed by the latter state: the reason being that the will is not a completed act until the testator dies, and as he does not die abroad no principle of comity enters into the case: *Moultrie v. Hunt*, 23 N. Y. 394. And a will invalid by the law of the last domicile will not pass personalty in a foreign country, although executed with all the formality required by the local laws: *Desebats v. Berquier*, 1 Binn. (Penna.) 336.

The rule as to formal execution of wills has also been abrogated in England and many of our states (24 & 25 Vict., c. 107), and the option of the modern Roman law permitted: *Irwin's Appeal*, 33 Conn. 128; N. Y. Code Civ. Proc., sect. 2612.

3. *As to Validity of Dispositions*.—Although there be a difference in the law as between the place of the last domicile, and the place where the movables are situate, still, if there be no positive law prohibiting the disposition made, the law of the domicile always governs: *Garland v. Rowan*, 2 Sm. & M. 617; N. Y. Code Civ. Proc., sect. 2694. The reason of this, in the language of Chief Justice ABBOTT, "is not that the law of England gives way to the law of the foreign country; but that it is a part of the law of England that personal property should be disposed of according to *jus domicilii*:" *Birtwhistle v. Varāill*, 5 B. & C. 438. When, however, the law of the domicile comes in conflict with an express statute of another jurisdiction, it loses its binding force: *Harper v. Stanbrough*, 2 La. Ann. 377. It is a maxim that the law of comity cannot prevail in any case where it violates the law of our country, the law of nature, or the law of God: BEST, J., in *Forbes v. Cochran*, 2 B. & C. 448. For it is the attribute of every government, as a necessary result of its sovereignty, to establish such modifications of the right of property in things within its jurisdiction, as the public interest and the policy of its laws require. Indeed, an explicit interdiction is not necessary to prevent the operation of the rule of the *lex domicilii*. It has been held that the interdiction may result from general laws declaring public policy, as well as special laws covering the precise point: *Mahorner v. Hooe*, 9 Sm. & M. 247.

This condition of the law leads to the remark that testamentary bequests often have to comply with the laws of two states. For if a will, by the law of the domicile, have all the forms and requisites to pass title to personalty, the validity of particular bequests may still depend on conformity with the law of the domicile of the legatee: *Chamberlain v. Chamberlain*, 48 N. Y. 433. So it was expressly decided that a bequest by a citizen of this state to a charity to be administered in a sister state, although lawful by the law of the state, the domicile of the testator, was invalid for non-compliance with the laws of the state where the fund was to be administered: *Kerr v. Dougherty*, 79 N. Y. 327.

4. *As to Construction*.—Where a person has several residences and makes a will disposing of his personal estate, the law presumes that the will was made with reference to the law of his domicile: and wherever such will becomes the subject of legal inquiry, that is the law to be applied in its legal interpretation and construction: *Trotter v. Trotter*, 4 Bligh. (N. S.) 502; *Parsons v. Lyman*, 20 N. Y. 103; see Code Civ. Proc., sects. 2612, 2694. Where a testator domiciled in England made a will in Scotland, disposing of movables, Lord BROUGHAM said: "His written declarations must * * * be taken with respect to the English law. I think it follows from hence, that these declarations of intention touching that property must be construed (by the Scotch court) as we should construe them here, by our principles of legal interpretation:" *Yates v. Thomson*, 3 Cl. & Fin. 544. So where movables are bequeathed to a testator's "heir at law," it is presumed the testator intended him who is heir by the law of domicile: *Harrison v. Nixon*, 9 Pet. 483. And where a lady domiciled in England, resided for a long period in Scotland, and there made a will bequeathing an absolute interest in her personal property, the legatee having died in her lifetime, it was held that the law of England governed the construction, and that by that law her representatives, and not those of the legatee, were entitled; though by the law of Scotland the interest does not lapse by the death of the legatee: *Anstruther v. Chalmers*, 2 Sim. 1. The same rule was subsequently followed in the House of Lords, in a case where a testator domiciled in Russia, made a will in the Russian language, disposing of certain personal property in England. The will was construed, in the latter country, in accordance with the law of Russia: *Enohin v. Wylie*, 10 H. L. Cas. 1.

B. CASES RELATING TO REALTY.

It is the common and received opinion, with respect to immovables, that the law of the place where they are situate is to govern in their transfer and devolution. *Communis et recta sententia est, in rebus immobilibus, servandum esse jus loci in quo bona sunt sitæ*: Huberus, de Confl., Leg. I., liber 3, tit. 13. This principle is doubtless to be attributed to the feudal system, and is adhered to more rigidly in England and America than in continental Europe. It may be stated generally that the *lex situs* is to be applied to determine the character of the property: Fœlix, Droit Int. Privé, No. 60, n, the rights of which, the diverse kinds may be the subject, and the persons to be admitted to the enjoyment of these rights: *Newlands v. Chalmers's Trustees*, 11 Sh. & Dunl., Sea. Cas. 65. And it must be further consulted respecting the modes which, with due regard to the public interest, this law has provided for the acquisition, protection and transmission of these rights: *Beatar v. Smith*, 3 Knapp 143. For convenience, the same classification may be made as in the rules relating to personality.

1. *As to Testamentary Capacity*.—The real statute in regard to capacity to devise, is in the common law, applied with the utmost rigor. If a person is incapable by the *lex rei sitæ* of transferring his real estate, any will of it made by him will be invalid, though by the law of his domicile or by the law of the place where the act is done, no such incapacity exists: IV. Phil. Int. Law 448; N. Y. Civ. Proc., sects. 2612, 2694. This, however, is not the uniform opinion of the continental jurists. Those authorities are about equally divided between this principle and the rule that the law of the domicile should govern, with the great names of Grotius, of Savigny and of Fœlix, in favor of the latter view: Wharton Confl. Laws, sect 570, n. 3. But the first principle is acted upon with great unanimity in this country. See *Eyre v. Storer*, 37 N. H. 121.

2. *As to Forms and Solemnities of Execution*.—As the disposition of real property is exclusively subject to the law of the state where it is situate, it is the sole privilege of that law to prescribe the form of instrument by which the title may be transferred: *McCormick v. Sullivan*, 10 Wheat. 192; N. Y. Code Civ. Proc., sects. 2612, 2694. This branch of the general rule was laid down in an early case, where a will was made beyond sea, which did not conform to the formalities of the English law. The court said: "The

will, *as to the land*, must be void; and it makes no difference that the will was made beyond sea, the same being lands in England, which if they pass by will, must pass by such a will and so circumstanced and attested as the laws of England require:" *Coppin v. Coppin*, 2 P. Wms. 298; *Doe v. Pickett*, 51 Ala. 584. Following this principle, it has been held that where a local statute provided that no foreign will should affect real estate unless filed in the county where the land lay, the requirement of the statute must be strictly complied with, or the will would be inoperative as to such land: *Kerr v. Moon*, 9 Wheat. 565. It may therefore happen that a will would fail to pass really in a foreign jurisdiction, by reason of non-compliance with the formalities prescribed by the *lex rei sitæ*, and yet be valid to pass personalty there; compliance with the law of the domicile being sufficient for that purpose: *Potter v. Titcomb*, 22 Me. 303. And conversely, a will void for informality, by the law of the domicile, or where made, may yet be effectual to pass title to real property in another state, by reason of its due execution according to the solemnities there required; though it would be invalid as to personalty there also: *Holman v. Hopkins*, 27 Tex. 39.

A question as to leaseholds arises at this point. Are they to be governed by the law of the owner's last domicile, or the law of the place where the land lies? In the Roman law and systems derived from it, they are governed by the same law as the land, being included in the term immovables. And this is the rule in England; *Freke v. Lord Carbery*, L. R., 16 Eq. 466. In New York, however, a leasehold, for this purpose, as well as for others, is considered to be personal property, and is allowed to pass by a will not within the requirements of the Revised Statutes, provided it be valid by the law of the last domicile: *Despard v. Churchill*, 53 N. Y. 192; the rule would now be this way under sects. 2611, 2612, Code Civ. Proc.

3. *As to Validity of Dispositions.*—On this point there is no conflict. It is universally agreed that the *lex rei sitæ* is to prevail not only in the matter of the transfer of lands, but also as to the nature, extent and purpose of the dispositions: *White v. Howard*, 52 Barb. 306; s. c. 46 N. Y. Code Civ. Proc., sect. 2694. Accordingly, in a state where the birth of a posthumous child operates to nullify a will, a testator domiciled elsewhere cannot dispose of property to the disinheritance of a child born

after his death: *Eyre v. Stover*, 37 N. H. 114. Although properly executed by the law of the domicile, and effective to pass real estate there, the birth of a posthumous child would operate as an abatement of all devises of property situated in the foreign state: *Kingsbury v. Burnside*, 58 Ill. 337. So, also, where a foreign testator devises real estate, situate here, to certain charitable uses, it becomes incumbent on the courts of this state to determine, not only the validity of the dispositions, but also the capacity of the charitable bodies to take the property intended for them: *White v. Howard*, 52 Barb. 306. And where a legacy is left a wife in lieu of dower in foreign lands, and she refuses the legacy and claims her dower, the dower is to be admeasured according to the law of the state where the lands lie: *Bolton v. Sigler*, 29 Ark. 426. The question whether dower extends to all the lands of which the husband was at any time seised, or simply to those of which he died seised, is likewise determined by the same law: *Id.*

4. *As to the Construction.*—It has been said that the law of the last domicile is to furnish the rule of construction of wills, as well of realty as of personalty, unless it clearly appears from the terms of the will that the testator had in mind the law of the foreign jurisdiction: *Story Conf. Laws*, sect. 479 h. But notwithstanding the great authority of the writer who so states it, the rule as thus laid down is not borne out by the cases, and is undoubtedly opposed to the analogies of the law in this regard: *Whart. Conf. Laws*, sect. 597. As early as 1682, the courts of England refused to construe a will made in Dutch, and disposing of land in England, according to the law of Holland: *Bovey v. Smith*, 1 Vern. 85. The court said: "As to what was objected that in Dutch they never use the word 'heir,' that signifies nothing; for a will that concerns land in England must be so framed as by the law of this realm is required for the passing of estates, as hath been several times resolved in cases of Latin wills and the like": *Id.* And the courts of this country are equally explicit: *Jennings v. Jennings*, 21 Ohio St. 56. Where the question was whether equitable conversion of lands here situate had taken place by the terms of a foreigner's will, the judge said: "It is for the courts of New York, as to the real estate in New York, to construe the will," and to construe it by our law: *White v. Howard*, 52 Barb. 306. Also where the question was whether after-acquired realty passed by a general devise of land "wherever situate," it was held that the judge of the *situs* apply-

ing the local law was the one to construe the will: *Applegate v. Smith*, 31 Mo. 168. The proper rule, therefore, and the one in accord with the analogies and present authorities of this branch of the law would seem to be that it is not at all a question of what law the testator had in view, but that, in construction, the law of the *situs* must govern: Whart. Conf. Laws, sect. 597.

J. P. KIRLIN.

New York.

RECENT AMERICAN DECISIONS.

Supreme Judicial Court of Massachusetts.

NEW ENGLAND TRUST CO. v. EATON.

Where a trustee of a fund which is held for the benefit of a life tenant with remainder over, purchases as an investment bonds at a premium, he may retain out of the interest such sums annually as will restore to the fund, at the maturity of the bonds, exactly what was taken therefrom at the time of purchase. (MORTON, C. J., HOLMES and ALLEN, JJ., dissenting.)

Hemenway v. Hemenway, 134 Mass. 446, distinguished.

The right of the trustee to retain such sums out of the income may be adjudicated by the probate court upon the settlement of an annual account of the trustee.

THE material facts appear in the opinion of the court, which was delivered by

DEVENS, J.—This is an appeal from a decree affirming a decree of the probate court, by which the account of the New England Trust Company, a trustee holding a fund, the income of which was payable to a tenant for life, with remainder over, was disallowed. The system which had been pursued by the trustee with reference to the investments which it had made in bonds and other promises to pay of the United States government, or of municipal or railroad corporations, due on a certain day, for which premiums had been paid, was to ascertain, by tables in use among bankers and brokers, what was, in fact, the net income arising from these promises—considering the premium actually paid by the investing trustee, which would not be repaid at the maturity of the bond, the rate of interest, the date of payment of the security—and to pay over this net income to the life-tenant; the difference between this net income and the actual rate of interest as received, going to a fund which, at the date of the maturity of the promise, would leave the original capital intact. The decree appealed from directed the

trustee to pay to the life-tenant, as income, the sums thus retained for the purpose of being returned to capital.

Whether the question presented may be heard and adjudicated by the probate court, and then by this court, on appeal, has been doubted. The New England Trust Company is a testamentary trustee, compelled by statute to render its accounts at least once a year to the probate court, of the hearing on which the fullest notice must be given, and the question is one immediately connected with the administration of the trust. The probate court has full power to see and provide that every interest shall be fully represented, and it is to be observed that this court has also, concurrently with the Supreme Judicial Court, full jurisdiction to hear and determine in equity all matters in relation to trusts created by will: P. S., c. 141-143. It had the right to determine whether, upon the account rendered by the trustee, it was its duty to account for the sums it had set aside as a part of the capital of the estate, or as its income, and to hold or pay them over accordingly.

Without discussing those cases in which it has been held that, in settling the accounts of the executors of a will, the relative rights of legatees under a will, and other questions arising under the will in reference thereto, cannot be decided; all of which are not, perhaps, fully reconcilable; they do not affect the question of jurisdiction here involved: *Granger v. Bassett*, 98 Mass. 469; *Cowdin v. Perry*, 11 Pick. 512; *Burbank v. Whitney*, 24 Id. 151, first paragraph. Even if we should hold that it was intended that in the administration of an estate the probate court should not pass upon the difficult questions of construction often arising out of wills, but should determine simply the amount of property subject to distribution, it could not affect the present inquiry. The specified object of requesting trustees to render annual accounts, is to ascertain whether the trustee has properly dealt with the trust property. In such a case as the one at bar, the trustee necessarily includes in his account the payments he has made, and describes the investments in which he holds the trust property. If he has paid over to the tenant for life that to which the tenant was not entitled, he should not be allowed therefor; and if, on the other hand, he has transferred to the *corpus* of the fund that which he should not, this should be corrected. Before the hearing in the probate court, and in this court, upon the account of trustees, questions similar to the principal one in the case at bar have here-

tofore been determined. See *Harvard College v. Amory*, 9 Pick. 446. It was determined whether a sum received by the trustees of an estate was rightfully paid to the widow of a testator, instead of being reinvested by the trustees as a part of the capital of the trust funds. In *Heard v. Eldredge*, 109 Mass. 258, upon the appeal by the life tenant from the decree of the probate court allowing an account by which a certain sum was treated as capital, and not as the income of a trust fund, the decree of the probate court was affirmed. To the same effect are *Bowker v. Pierce*, 130 Mass. 262, and *Dodd v. Winship*, 133 Id. 359. The case of *Wright v. White*, 136 Id. 470, is not inconsistent with the view that, upon the settlement of an account of the trustee, it may be determined whether a sum of money should be treated as the capital or the income of a trust fund. The decree upon such an account deals only with what has been done in the past, although a decree allowing an account of what has been done may afford a guide in ascertaining what will be allowed in the future. What is said on this subject in *Wright v. White*, *ubi supra*, is that in a decree allowing an account a direction as to the mode in which a trustee should thereafter manage the trust fund, was not properly a part of the decree allowing an account, and was to be stricken out.

We proceed, then, to consider whether the course pursued by the trustee was correct, and thus whether the account of what he has done is to be allowed. It is the general rule that when investments are made in property of a permanent character, and not in terminable securities, the loss or gain in such investment is that of the *corpus* of the estate. If, for any cause, it be reduced in value, and it becomes necessary to sell it, the sum for which it is sold becomes a new principal, on which the life tenant is to receive the income. In the management of real estate, when permanent improvements are placed thereon, these are a proper charge of the capital, while usual and ordinary repairs, when made, are a deduction from the income: *Parsons v. Winslow*, 16 Mass. 361. If a trustee purchases shares in the capital stock in a bank, inasmuch as the remainder-man will receive exactly that which is purchased, the tenant for life should receive the full income thereof undiminished. Such was the course pursued by the trustee in the case at bar, in regard to the bank shares purchased by it. Nor does it become the duty of the trustee to sell such shares, should they appreciate in value after he has invested in them, and pay over to the

tenant for life the amount which they have increased in value. If it becomes necessary to sell such shares in the proper administration of the trust estate, the gain or loss is that of the capital of the estate, and the sum recovered constitutes a new principal.

The tenant for life does not seek any order by which the bonds, the interest on which is here under discussion, are to be sold or the investments changed; nor can it be contended that these securities are not of a class in which trustees may invest, if due care has been used in the selection. The rule "that no investment can be considered safe or can be approved by a probate court or court of equity, except in public securities, however well supported by authorities," says Chief Justice SHAW, "as a rule well established in English courts of equity, is wholly inapplicable and untenable in this country:" *Lovell v. Minot*, 20 Pick. 116. While there are now many more public securities than those which existed when this remark was made, investments cannot be confined to them. A loan at a fixed rate of interest, even if secured by the stock of a manufacturing or other business corporation as collateral security, if proper security is taken against fluctuations, is necessarily injudicious: *Brown v. French*, 125 Mass. 410. There are many stocks under public supervision—bonds of corporations—where there is sufficient capital to insure their safety, which, with bonds of municipalities, loans secured by mortgage, constitute proper investments. The purchase of the bonds by the trustee appears to have been judiciously made. Substantially all have appreciated in value, and they are of the class of securities contemplated as investments by the statute under which the trustee does its business: St. 1869, c. 182, § 5; St. 1871, c. 142; P. S., c. 116, § 20.

Assuming that the purchase of bonds even at a premium, was safe, prudent, and such as judicious men would make in the conduct of their affairs, which is substantially the rule heretofore laid down, the question arises: Inasmuch as it is certain that the *corpus* of the fund is to be diminished if this investment is permanent, whether the trustee may retain such sums annually as will restore to the fund at its maturity exactly what was taken therefrom at the time of the purchase? This is what the trustee has undertaken to do. If, as suggested in argument, there is any inaccuracy in the calculation by which this result is reached, this is a subordinate matter, to be determined by more accurate accounting should it be required, not necessary now to be discussed. That which is really income

from a bond purchased at a price above par, say 120, and payable in ten years, is not the amount received in interest annually, but that amount deducting therefrom the sum necessary to restore at the end of the ten years the \$20 premium. No prudent man would treat as income from his property the whole amount received when there was thus to be a diminution of his principal, amounting at the end of the ten years to this premium, and steadily tending to this during the entire period. To deal with interest thus received as income purely, would, to the extent of the premium, exhaust the capital. The premium paid is no more than an advance from capital, which the remainder-man is entitled to have repaid if he is entitled to receive the capital intact. If, in such a case, the tenant for life should die before the maturity of the bond, and thus the whole advance not then be repaid, he would have paid no more than his just proportion. Unless the premium is to be restored it is not easy to see how investments in bonds having a premium can be made in justice to the remainder-man, whose property (where a bond is kept to maturity) is diminished solely for the benefit of the tenant for life. Into the question how much income an investment, at a premium, in a bond, payable at a fixed future time, produces, the loss of the premium at that time necessarily enters as a factor. The bonds purchased by the trustee have substantially all appreciated in value; and this, to such an extent that if they were now sold, the surplus beyond the sum which would be necessary to restore to the capital all that was paid at the time of purchase by way of premium would enable the trustee to pay the tenant for life the deductions that have heretofore been made in order to repair the principal at the maturity of the bond. The life-tenant, therefore, insists that the trustee should now be ordered to pay to her those sums, as, if a sale were made at this moment, they would not be needed to repair any deficiency in the principal.

The trustee is to manage the fund in his hands, not for the purpose of speculation, "but in regard to the permanent disposition of the fund:" *Harvard College v. Armory*, 9 Pick. 461; *Lovell v. Minot*, 20 Id. 116. The argument of the tenant for life, that the practice of holding securities until their maturity would deprive him of the "every care and ability in the management of the trust, for which he pays compensation to the trustee," can readily be pressed so far as to sanction the practice of trading and trafficking in trust securities, which would be attended with dangerous results

to the trust fund. Investments carefully and judiciously made are not, as a general rule, to be disturbed. The argument of the tenant asserts that the income obtained for the tenant is less than one-half of that which might be obtained on absolutely safe mortgages. The case affords no evidence of this, nor in this proceeding, which only concerns the account of the trustee, and the amount of his payments to the tenant, could it be settled whether, in this view, the trustee should be ordered to dispose of the securities.

But, if the securities were sold and a larger sum realized than would be necessary to restore to the *corpus* of the estate that which was taken from it when they were purchased, the question would still be whether the appreciation of the securities in market value was the property of the tenant for life or of the remainder-man. There is no ground on which it can be contended to belong to the tenant for life, unless he is also to be made responsible where loss occurs in the purchase and subsequent sale of securities. There cannot be this chance of profit for him unless there is to be a corresponding risk in such transactions. If the rule that when a security is kept to maturity, income is to be paid only to such an extent as shall leave the *corpus* of the estate at that time intact by restoring to it the premium paid at the time of purchase, be just, it is equally just that the gain or loss that occurs by a sale thereof, if for any cause one shall become necessary while it is running, should be that of the *corpus* of the fund. The estate of the tenant for life will be unaffected thereby, except so far as it may be altered when a change is made in securities by the increase or diminution of the sum to be re-invested. To expose the estate of the tenant for life to any risk beyond what is involved in this, and, because there may be a possible chance for gain under some circumstances by changes in investments; to subject it to the loss which occurs, when, for any cause, it becomes necessary to sell, at a diminished price, securities purchased for the trust estate, would be to defeat the object for which tenancies for life are in most cases created.

In *Parsons v. Winslow*, *ubi supra*, there had been a loss to the trust estate by the defalcation of the trustee, whose successor had been able to recover from him in value only a portion of the property originally intrusted to him. It was held that the diminished fund thus received would constitute a new principal, and that the loss would thus "be apportioned in the same manner as if it had arisen from the fall in the price or value of any public stocks or of

any land in which the fund should have been invested according to the provisions of the will." It is said by Mr. Justice JACKSON: "It would be unjust and contrary to the manifest intent of the testator, if the tenant for life, on the one hand, should continue to receive the whole amount of the interest on the original fund after the principal had been thus reduced; or if, on the other hand, the income should be applied to replace the principal. In the one case, the tenant for life would be left for an indefinite period without any support or benefit from the intended bounty of the testator; and in the other, the remainder-man might loose all that was intended for him."

It has been suggested that a suspense account might be kept by the trustee, to which sums, such as have in the case at bar been retained, might be carried; and if hereafter the bonds should be sold before maturity at an advance, the life-tenant would be entitled to receive therefrom all that was not required to restore the capital originally invested. This suggestion is based upon the theory that any possible profit made by the sale of securities belongs to the tenant for life, and still involves the idea that he must bear the possible loss. We cannot consider this, except so far as his estate is affected by the increase or diminution of the sum to be reinvested. Such a suggestion would require, as a corresponding duty, that when a bond was depreciating in value there should be retained from the life-tenant's income such sums as would be necessary to repair the loss to the capital of the estate by such depreciation, should it be sold before maturity.

There can ordinarily be no better test of the income which a sum of money will produce, having regard to the rights of both the tenant for life and the remainder-man, than the interest which can be received from a bond which sells above par, and is payable at the termination of a fixed term, deducting from such interest as it becomes due such sums as will at maturity efface the premium. If such a bond has increased in value since its purchase, assuming it to have been an entirely safe investment, and none other should have been made, it has been because a change in the rates of interest, or some similar cause, has altered market values. There would be no reason to suppose that such a bond could be sold, and the amount received reinvested at any higher rate of interest, unless at the sacrifice of some safeguard in the investment. The investments of trust property should be made with a view to permanency, and

not in any spirit of speculation; nor should changes be made except after much inquiry and circumspection, and ordinarily with an immediate and advantageous reinvestment in contemplation. In making such changes the trustees are not entitled so to exercise their authority as to vary or affect the relative rights of the *cestuis que trust*: Hill on Trusts 483.

The only case in this country which we have found, or to which we have been referred, deciding the question we have considered, is, *Farwell v. Tweddle*, 10 Abb. N. C. 94, in which it was held that a course similar to that pursued by the trustee in this case was correct and proper. Not much assistance was to be expected from the English cases, as until 22 & 23 Vict. c. 35, § 32, authorizing investments in East India stock, only one security, the 3 per cent. consols, bank stock, was there recognised as proper for trust-estates. An investment in the 3 per cents, which it is not contemplated will ever be paid, and the holders of which have been considered as perpetual annuitants, has been deemed the only safe investment, and peculiarly adapted for the purpose, as, until a recent period, they have been below par. The principle is well established by all the English cases that the *corpus* of the trust capital is to be kept intact, so that the remainder-man may thus receive it, while, in justice to the life-tenant, it must be kept in income-producing property. When the testator makes a general gift of his estate to, or in trust for, a person for life, with remainder over, so much of the property as consists of leaseholds, terminable annuities, or other interests of a perishable nature, must be converted and invested in these permanent securities. As they are permanent, whether purchased above or below par, the life-tenant receives the full income, the remainder-man receives undiminished that which has been purchased, and no adjustment of the relative rights of the *cestuis que trustent* has been necessary. It is contemplated that there may be specific gifts of terminable or perishable securities which shall show an intention on the part of the testator that the life-tenant may exhaust or consume them, in which case reinvestment would not be required, nor indeed proper. In the absence of these, if, in contradiction of the general rule, the trustees suffer the tenant for life to receive the whole income arising from such securities, he will be decreed to refund what he may have received, over and above what he would have received if the conversion had been duly made and the proceeds invested in the 3 per cents. This difference is treated as capital to be invested

for the benefit of all parties entitled, and the tenant for life is bound to make it good in the first instance. On his failure, the trustees are responsible therefor: *Hill on Trusts*, sect. 386, and *Perry on Trusts*, sect. 547.

The same principles have been applied since investments of trust funds were, by the statute of 22 & 23 Vict. c. 35, permitted to be made in East India stock, which is a security that, as well as certain other stocks named, may be redeemed. The courts have constantly refused to allow any investments to be made therein, unless there were peculiar reasons for favoring the life-tenant, or at the request and on the application of the settler of the trust: *Equitable Rev. Int. Soc. v. Fuller*, 1 Johns. & H. 379; *Hemenway v. Hemenway*, 134 Mass. 446. In such cases the direction has sometimes been, that the investment should not be made unless the stock could be purchased at par: *Waite v. Littlewood*, 41 L. J. (N. S.), ch. 636. One reason given in *Cockburn v. Peel*, 5 De Gex, F. & J. 170, for refusing to permit a purchase of East India stock, was that it must be purchased at an advance, and that there was no provision in the act for any sinking fund by which the deficiency made could be supplied.

In *Hume v. Richardson*, 4 De Gex, F. & J. 29, it was held that for the period between the death of the testator and the passing of the statutes 22 & 23 Vict. c. 35, the life-tenant was entitled only to such income as she would have received had the stock been converted and invested in consols; and that although, after the passage of this statute, she was entitled to the whole income, yet the trustees were only justifiable in keeping the East India stock until a suitable investment could be made in land, in which, by the will, the trustees were directed to invest.

Brown v. Gellatly, L. R., 2 Ch. 751, decides no more on this subject than that when the testator authorizes investments as permanent, which would otherwise be unauthorized, the life tenant has the full income. This authority, given by the will, indicated a preference of the life-tenant to this extent, which took the case out of the ordinary rule. "I understand," says the chancellor, "the words of the will as amounting to the constitution by the testator of a larger class of authorized securities than the court would have approved of, and the court has merely to follow his directions, and treat the income accordingly as being the income of authorized securities." Other securities not coming within this class were

ordered by the chancellor to be converted as soon as possible, and until this could be done, the life-tenant would be entitled thereon "to the dividends on so much three per cent. stock as would have been produced by the conversion and investment of the property at the end of the year."

The method in which the English courts deal with leasehold estates, a common species of terminable securities not known in the same form in the United States, when they are settled in trust for life, with remainders over, under such circumstances that the settler must have regarded them as continuing interests for all the beneficiaries of the trust, including the remainder-man, is strictly analogous to that which the trustee in the case at bar has pursued. These estates, which are terminable on a life or lives, or at the end of fixed terms, are renewable, sometimes by express contract, and sometimes by custom which has been recognised as legal, upon the payment of certain fines and other expenses. It is held to be the duty of the trustees to preserve the leasehold estates by renewing, at the usual periods, for the benefit of the parties in remainder. In the absence of other direction by the settler, the fine, &c., for renewal is to be paid out of the rents and profits in the proportion in which the *cestuis que trust* enjoy the estate. If a renewal becomes impracticable, the tenant for life does not reap the whole advantage of non-payment of the sum properly due for renewal, if there was an express trust for renewal. His interest, minus the expenses of the renewal, is all that is given him, and his proportion of the amount fairly to be paid for renewal is still a proper charge on the leasehold estate for the benefit of the remainder. When the leasehold estate is for years, the amount to be paid is readily ascertainable by the proportion which the tenant for life enjoys of the leasehold estate; and when it is for lives, and there is no express fund created for the renewal, it is more difficult, and the court has sanctioned the plan of insuring the lives of the *cestuis que vie* to an amount sufficient to cover the usual expense of renewing on the dropping of a life: *Hill on Trusts* 436. While the cases on this subject are complicated by the express provisions made in the settlements, and appear in some respects confused, they establish fully the position that, in the absence of direction otherwise, the property received is to be turned over by the tenant for life as he received it, and that his income is not the full rent and profit, but those after deducting therefrom, as accurately as it can be ascer-

tained, his just proportion of the expense of maintaining the security by renewal of the lease.

The tenants for life rely much upon *Hemenway v. Hemenway*, 134 Mass. 446. This was a bill in equity by which was brought before us the whole management of a large estate, in which very ample discretionary powers had been given to trustees. The testator had left, subject to the trust, bonds payable at a fixed period. As between the tenant for life and the remainder-man, it was decreed that the trustees, by the authority conferred by the clause of the will "to hold the said property as they may receive the same, or at their discretion to sell the same," were entitled to continue their investments as such, and to retain these bonds until they were paid off, and that, "the whole net income of the investments thus authorized must go to the tenants for life, by the terms of the will." There was also an investment made by the trustees in certain bonds, having nearly eighteen years to run, on which a small premium had been paid. The case was decided upon its own peculiar circumstances, which, so far as disclosed, were held to show no special reason why the tenant for life should not receive the interest paid on the bonds. The investment constituted "a very small proportion of a large estate," and Mr. Justice HOLMES remarks: "We have no reason to doubt that, taking the whole administration of the trust into account, the balance has been evenly held between the two parties, and the relation between the remainder-man and the life-tenants is such that there is less call than there might be in some other cases for treating the life-tenant with great strictness."

It certainly was not held that the trustee might not, for the trust estate, purchase, under some circumstances, at a premium, bonds payable at a fixed time, and, exercising his discretion honestly and for the purpose of dealing fairly with both parties, might not reserve, as received, some portion of that paid as interest, sufficient at the end of the period to restore the premium to the capital, by the loss of which it would otherwise be depleted.

Upon the account rendered by the trustee in the case at bar, as heretofore said, the question whether, by virtue of our supervision over trusts, the trustee should be ordered to change his investments, is not sought to be brought before us. Upon these, as they exist, the deduction from the full interest reserved to restore the premium at the end of the term, was properly made. It is only thus that

the property can be turned over to the remainder-man undiminished. If the estate of the tenant for life terminates before the bond expires, the cost of effacing the premium will be borne in the right proportion by the respective *cestuis que trust*.

In the opinion of the majority of the court, the entry should be, "Decree reversed."

HOLMES, J. (*dissenting*).—If the opinion of the majority rests on the ground that, so far as appears, the trustees might have made their investments with the intent to keep them until the trust expired or the bonds matured, and in the exercise of its discretion as a business manager, in view of the particular circumstances of the case, thought it necessary to retain a fund in suspense against a probable loss of premium, speaking for myself alone, I should have been disposed to acquiesce in that opinion. But from the main line of reasoning actually adopted, I must dissent, upon grounds both of principle and authority.

Shortly stated, I understand that reasoning to be this: That if a bond is bought at a premium, it must be assumed that the premium is paid, for the single reason that the rate of interest on the bond is higher than the market rate, because it must be assumed that the investment is absolutely safe; that, therefore, the analogy of wasting investments, such as leaseholds, applies, and that an annual deduction from interest is proper.

So far, this is precisely the argument that was pressed upon us with much force in *Hemenway v. Hemenway*, and which was rejected after the gravest deliberation. A great part of the opinion was devoted to answering it, and it still seems to me that the discussion was necessary to the decision of the case. *Hemenway v. Hemenway*, did not bring before us the whole administration of the estate, but certain specific questions, one of which was whether the interest should make good the premium paid by trustees for bonds purchased by them above par. If the rule now adopted had been recognised, it would have been unnecessary and improper to look beyond the particular bonds to the rest of the account. It was because that rule was repudiated that it was said, and deliberately said, that nothing showed that the premium was paid for interest above the market rate, and that the whole administration of the trust might be considered. The latter principle is not the law in jurisdictions when authorized investments are limited in number, as in New York, but each investment is dealt with sepa-

rately. The only reason for departing from the precedents elsewhere was, that in the latitude allowed trustees in this Commonwealth, it was thought impossible to assume that premiums were paid in respect of interest alone. I think, therefore, that the opinion of the majority is opposed to one of the points directly decided in *Hemenway v. Hemenway*, as it certainly is to the whole course of reasoning in that case, and I am confirmed in my opinion by the fact that two other of the four surviving justices who took part in the decision are of the same mind. I must suppose that *Hemenway v. Hemenway* has been accepted by trustees as expressing the settled opinion of the court. I cannot foresee the extent or nature of the evil that may follow from our abandoning what has been acted on as law. But I should be most unwilling to overrule a decision which I supposed to have been accepted as a guide in dealing with property, even if I thought it wrong. I do not, however, think either the decision or the reasoning in *Hemenway v. Hemenway* wrong, and I refer to that case for what I do not deem it necessary to repeat here.

But I understand the opinion of the majority not to stop with overruling *Hemenway v. Hemenway*. In this case the bonds thus far have not depreciated, but have risen, in value. No part of the premium has been lost as yet; but the argument is either that it is to be presumed that the bonds will be kept until the premium is lost, or else that the approach to maturity is a constantly acting cause which depreciates the bond so much each year with mathematical certainty, and that even if the depreciation is disguised by a more powerful motion the other way, it must be allowed for, because the rise in value belongs wholly to the *corpus*, and would have been so much greater but for the counteracting influence. I think I fully appreciate the logical force of this argument, but it appears to me to illustrate the danger of relying on logic when your premises are fictitious. The necessary premise for casting the whole burden of repaying premiums upon interest is, that the premium is paid solely for interest above the market rate. If that premise is a fiction, as I think it is, and if considerations of policy are held, nevertheless, to justify its adoption, at least the conclusion to be drawn from it should be guarded and restrained by considerations of a similar nature. I can hardly think that if the trust had been terminated, or the bonds sold, at the date of the account, when the coupons had actually gained by the investment, the sums

retained from interest would be paid over to the remainder-man. Yet that conclusion would follow from the reasoning. I think, in other words, that the question of holding the balance even between tenant for life and remainder-man is a problem so dependent on the particular facts, and so complex, that while we cannot hope to solve it with perfect accuracy, every one would feel that to cut the knot with a formula, in the case I have supposed, would be an unnecessary abandonment of the discriminations within our power, and, as a practical judgment, would be as likely to work injustice as justice.

If I am right so far, what difference can it make that the trustee has not sold? Whether it is or is not true, as is said in *Hemenway v. Hemenway*, that a determination not to sell, if a sale is possible, stands on much the same footing as a purchase, I apprehend that if a trustee, having the usual powers, sells and reinvests twenty times in as many days, he is not *ipso facto* guilty of a breach of trust, and that if the reinvestments are proper and profitable his conduct would not be open to animadversion. On this point the English books can give us no light. At all events this trustee might sell now if it saw fit. On what ground is the determination of the trustee not to sell—a determination which the court cannot revise—to change the relative rights of the *cestuis que trust*?

Let us look a little further into the rule adopted. Suppose a sale to have taken place, and other bonds to have been bought at a price above par. The trustee will, of course, compute the rate of interest to be received by the tenant for life in the future, by deducting the annual sums necessary to replace the new premium paid. But there is no particular sanctity in the rate which happened to prevail at the moment of purchase; still less in the rate artificially determined by the premium paid. If there has been no sale, but the market price of the bonds has risen, *ex hypothesis* the rate of interest is conclusively proved to have fallen, because the fall in the current rate of interest is the only recognised ground for a rise in price. Why is not the remainder-man entitled to have a new computation started on that footing? Why is not the tenant for life entitled to have the reservation diminished if the rate of interest rises? And pushing the principle to its logical result, why is not the trustee bound to follow the fluctuations of the market from day to day, attributing them all to the fluctuations of interest, as he is bound to do?

I now recur to the premises of the argument which I am opposing.

I repeat what was said in *Hemenway v. Hemenway*, that I do not see how we can start with the assumption that all proper investments are absolutely safe, when the leading case in this state is to the very point that an investment may be unsafe, and yet justifiable: *Lovell v. Minot*, 20 Pick. 116. But the assumption appears to me to be inconsistent with facts which we must notice, and to lead to the conclusion not yet mentioned which we could not accept. Within a few years the first mortgage 4 per cent. bonds of a flourishing railroad have sold at 85, while at the same time United States 4 per cents stood at 120 or more, and city 4 per cents of a high rank stood at about par. The differences were not to be accounted for by the difference of time which the bonds had to run, or by exemption from taxation. I should be surprised to learn that either bond was not a proper investment. If they all were proper investments, the difference in price could not be referred to difference in interest.

Again, if the fiction of safety be adopted, I still do not see why it does not follow that if a bond is bought below par the tenant for life is equally entitled to an annual increment on the interest received by him as the bond gradually approaches maturity. This was argued in *Hemenway v. Hemenway*, but I must believe that such a doctrine would disconcert trustees not a little. Of course it would call for sales of capital from time to time to produce funds for the tenant for life beyond the amount received on the bonds. There is a well-known bond which was purchased by trustees a few years ago at 50 per cent, and which now stands at 120 or over. How is a case like that to be dealt with?

If it be said that the consequences suggested follow only upon an attempt to carry logic too far, and that they are to be controlled by practical judgment, I agree. But I think that the same thing ought to be true of the step now taken, as I have said already. If we are to start with a fiction, and then apply logic, I think these results follow. If we are to use our judgment, I do not see why we should not use it at every step, and I believe that, to make the tables referred to the universal arbiter between tenant for life and remainder-man, is not so near an approach to justice as we may hope to make. I am much more disposed to regard trustees as a sort of domestic tribunal *ex necessitate* between the parties, subject to the control of the courts in case of a want of good faith or reasonable judgment.

Finally, I must repeat what was said in *Hemenway v. Hemen-*

way, after an elaborate examination of the English books, that, in my opinion, the English cases do not apply the principle of wasting investment to premiums on authorized permanent investments. But, even if they did, I should consider that, in view of the latitude of investment allowed in Massachusetts and the great fluctuations of American securities, it would be undesirable to accept that principle at present, and still more so to adopt the simple device of the tables as the means of working out that principle.

I express no opinion upon the question of jurisdiction, which I have not thought it necessary to examine, as both parties desire to have the case dealt with upon its merits now.

I am authorized to state that the Chief Justice and Mr. Justice CHARLES ALLEN concur in the views which I have expressed.

United States Circuit Court, W. D. Michigan.

**MINERAL RANGE RAILROAD CO. v. DETROIT & LAKE SUPERIOR
COPPER CO.**

A state statute provided that proceedings for the condemnation of land for railway purposes should be instituted in the probate court of the proper county; that the necessity for taking the lands, and their value, should be determined by commissioners or a jury selected by such court; and that such proceedings should only be subject to review by the Supreme Court. Under this statute a railroad company petitioned the probate court for the condemnation of defendant's lands. The defendant answered the petition, and demanded a removal of the case to the federal court. *Held*, that the case was removable directly from the probate court.

It is no objection to the jurisdiction of the federal court in such cases that it involves the exercise of the right of eminent domain.

ON motion to remand.

On the 14th of September, 1885, the Mineral Range Railroad Company filed its petition in the probate court for the county of Houghton, for the condemnation of certain lands owned by the defendant in the village of Hancock, for the purpose of constructing a branch of its road across these lands from Houghton to Hancock. The defendant shortly thereafter answered the petition, and upon the same day filed its petition in the probate court for the removal of the cause to this court, upon the ground that it was a citizen of the state of Connecticut. The removal was ordered, and a transcript of the record immediately filed in this court. The railroad company thereupon moved for the appointment of three commissioners

under the statute, accompanying its motion with an oral motion to remand for want of jurisdiction.

W. P. Healy, for the railroad company, petitioner.

T. L. Chadbourne, *C. B. Grant*, and *Otto Kirchner*, for the copper company.

The opinion of the court was delivered by

BROWN, J.—In delivering the opinion of the Supreme Court in *Gaines v. Fuentes*, 92 U. S. 10, 19, Mr. Justice FIELD remarked that the Removal Act of 1867 covered every possible case involving a controversy between citizens of the state where the suit was brought and citizens of other states, if the matter in dispute, exclusive of costs, exceeded the sum of \$500; that it mattered not whether the suit was brought in a state court of limited or general jurisdiction. "The only test was, did it involve a controversy between citizens of the state and citizens of other states, and did the matter in dispute exceed a specified amount? And a controversy was involved in the sense of the statute whenever any property or claim of the parties capable of pecuniary estimation was the subject of the litigation, and was presented by the pleadings for judicial determination." That controversies of the general nature of this are "suits of a civil nature at law" was settled in *Boom Co. v. Patterson*, 98 U. S. 403, which was also a proceeding under a statute of Minnesota for the condemnation of land under the right of eminent domain. There is, however, a difference in the methods of procedure under the two statutes which takes the case under consideration out of the language of the opinion in the Minnesota case, and involves it in a difficulty which was not there presented. In Minnesota the course was for the corporation to apply to the District Court of the county for the appointment of commissioners to appraise the value of the land, and take proceedings for its condemnation. If the award of the commissioners was not satisfactory to either party, an appeal might be taken to the District Court, where it was entered by the clerk as "a case upon the docket;" the persons claiming interest in the land being designated as plaintiffs, and the company seeking its condemnation as defendant. The court was then required "to proceed to hear and determine such case in the same manner" that other cases were heard and determined, with the aid of a jury, unless a jury was waived. The value of the land

being assessed, the amount of the assessment was to be entered as a judgment against the company, subject to a review by the Supreme Court. A similar question arose in one of the *Pacific Railroad Removal Cases*, 115 U. S. 1, and was held to have been answered by the reasoning in the *Patterson Case*.

In this state the act provides that, in case the railroad company is unable to purchase the needed land, it shall present its petition to the Probate Court, or the judge thereof, with proof of service of notice to all persons interested, who may show cause against the prayer of the petition and may disprove any of the facts alleged therein. Upon hearing the proofs and allegations of the parties, if no sufficient cause is shown against granting the prayer of the petition, the court or judge shall appoint three freeholders as commissioners to determine the necessity for taking the land, and to appraise the damages to be allowed to the owner, provided that either party may demand a jury whose powers shall be the same as those of the commissioners. Upon the report of the commissioners or the jury being filed, the court shall confirm the same, unless for good cause shown by either party, and shall direct to whom the money shall be paid. Within twenty days after the confirmation of the report either party may appeal to the Supreme Court, specifying the objections to the proceedings, and the Supreme Court shall pass upon such objections only, all other being deemed to have been waived.

There is no provision in this act for an appeal to the court from the award of the commissioners, and the forming of an issue to be tried by a jury, as were the cases in Minnesota and Kansas. But if a jury be demanded, the case is at once referred to them, and they proceed to pass both upon the necessity for condemning the lands in question, and upon the amount of compensation to be awarded the owners, acting, as has been held by the Supreme Court, both as judges of law and of fact, although by the terms of the act, the judge may attend the jury to decide questions of law and administer oaths to witnesses. In *Hess v. Reynolds*, 113 U. S. 73, there was also a provision for an appeal from the allowance of the commissioners appointed by the Probate Court to the Circuit Court of the county, where an issue was framed for trial by jury. Did the statute for the condemnation of land also provide for an appeal from the Probate Court to the Circuit Court, and the framing of an issue there, we should find no difficulty in holding, as was held in

that case and in *Boom Co. v. Patterson*, that the removal should be had from the Circuit Court, and not from the Probate Court. But does the failure of the statute to provide for an appeal from the award of the commissioners to the Circuit Court, and the framing of an issue there, deprive the case of its removable character? We think not. Had the petition been in the general form contemplated in some cases for the condemnation of all the land within the county needed for the purposes of the railway, making all the owners along the line of its road parties defendant, it might be a serious question whether a single non-resident proprietor whose property was sought to be taken could remove the case, even so far as it respected himself, to this court, although this also seems to be answered in the *Pacific Railroad Cases*, 115 U. S. 19. But we do not find it necessary to determine whether there might not be cases of this description to which the removal acts would not apply. In this case the railroad seeks the condemnation of a single specific parcel owned by the defendant. To its petition the defendant has filed its answer, setting forth its reasons why the prayer of the petition should not be granted. There is here a single, indivisible suit or controversy to obtain the possession of land in which the railroad company is plaintiff and the copper company is defendant, and the case does not differ essentially from an ordinary action of ejectment, except in the fact that plaintiff offers compensation for the lands it seeks to condemn.

Further objection is made to our assumption of jurisdiction, for the reason that it involves the exercise of the right of eminent domain, which is claimed to be non-judicial in its character, and therefore a special proceeding, to be carried on solely by virtue of the statute, in the courts of the state therein designated. The same position was taken by the landowner in the case above referred to, viz., that the proceeding to take private property for public use was an exercise by the state of its sovereign right of eminent domain, and with its exercise, the United States, a separate sovereignty, had no right to interfere. The position was said to be a sound one so far as the act appropriating the property was concerned; that when the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognisance. "The property may be appropriated by an act of the legislature, or the power of appropriating it may be delegated to private corporations, to be exercised by them in the execution of works in which the

public is interested. But, notwithstanding the right is one that appertains to sovereignty, when the sovereign power attaches conditions to its exercise, the inquiry whether the conditions have been observed is a proper matter for judicial cognisance."

We understand the meaning of this language to be substantially this: That the right of eminent domain, or of appropriating private property to public use, is a sovereign right, vested in the state itself, acting through its legislature; that the state may delegate this right to railway and other corporations, as it has done in this state, and may impose upon the exercise of the right such conditions as it chooses, with reference to the manner in which the application shall be made, the necessity for the appropriation of any particular lands determined, and their value ascertained, and when the court observes that the necessity of appropriating any particular property is not a subject of judicial cognisance, it means simply that it is not *necessarily* a subject of judicial cognisance. The legislature may seize upon and appropriate directly a piece of private property upon paying the owner its value, or it may authorize a corporation to do this by an appeal to its judicial tribunals. The court itself has no right to appropriate property; but in carrying out the will of the legislature, and in making the proper inquiries as to the necessity of the appropriation and the value of the lands, it is exercising judicial power. "If that inquiry take the form of a proceeding before the courts between parties, the owners of the land on the one side, and the company seeking the appropriation on the other, there is a controversy which is subject to the ordinary incidents of a civil suit, and its determination derogates in no respect from the sovereignty of the state." In the Minnesota case, as reported in 3 Dill. 465, it appears that the boom company was authorized by a special act to condemn the land necessary to its business, while in this state the same power is conferred by a general act upon all railroad companies. There is, however, no practical difference in the nature of the power vested in the courts in each case.

It is true, there are some expressions in the cases of *Toledo, &c., Ry. Co. v. Dunlap*, 47 Mich. 466, 452, and *Port Huron, &c., Ry. Co. v. Voorheis*, 50 Mich. 506, which indicate that, in the opinion of the Supreme Court, these proceedings to condemn lands are not in themselves, and never have been, regarded as judicial proceedings, because the legislature might, and sometimes does, authorize such proceedings to be carried on before highway commis-

sioners or other non-judicial bodies, and because, even when acting by appointment from a court of justice, the jury or commissioners are judges of the law as well as of the facts. But Mr. Justice CAMPBELL afterwards qualifies this remark to a certain extent by observing that "they are not judicial proceedings in the ordinary sense;" a comment in which we entirely concur. We understand, however, that whenever a court of justice is called upon to determine or adjust the rights of two or more parties standing adversely to each other, the court is acting in a judicial capacity, whether the decision of the question presented lies with a judge, or a jury, commissioners or referees selected by the court. Especially is this the case when such proceedings are subject to review by an appellate tribunal. In *In re New York Cent. Rd.*, 56 N. Y. 407, 409, the Court of Appeals held that the power of determining what lands were necessary to be appropriated to the use of railways was a judicial question, and, when controverted, the facts must obviously, in some form, be laid before the court to enable it to decide. So, in *Warren v. Wisconsin Rd.*, 6 Biss. 425, which was also a proceeding to condemn land for railway purposes, a motion was made to remand, on the ground that, as it was a proceeding by the state in the exercise of its right of eminent domain, the suit was to be regarded as substantially a suit against the state, of which the federal court had no jurisdiction. The motion, however, was denied; the court holding that the state had no interest in the controversy, and that, although it was a special proceeding, it was a suit within the meaning of removal acts. In *Railway Co. v. Whitton's Adm'r.*, 13 Wall. 270, the Supreme Court holds that when a general rule as to property, or personal right or injuries to either, is established by state legislation, its enforcement by the federal courts in a case between proper parties is a matter of course, and the jurisdiction of the court in such case is not subject to state limitation. In *Weston v. City Council of Charleston*, 2 Pet. 449, it was said that the term "suit" was certainly a very comprehensive one, and was understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords him. But we think this point is also covered by the case of *Kohl v. United States*, 91 U. S. 367, in which the Circuit Court was sustained in assuming jurisdiction of a proceeding to enforce the right of eminent domain in favor of the United States, to condemn lands for a government building, although there was no

statute authorizing the proceeding. That it was a suit was said to admit of no question. If proceedings to condemn be a suit, then the conduct and determination of such suit must be an exercise of judicial power.

But conceding that if the only question in this case were the amount of damages to be paid by the railroad company, the jurisdiction of this court would be sustained by the authorities above cited, it is insisted that these cases are inapplicable, because by the statute of this state the jury or commissioners must pass upon the question of the necessity for taking the property, as well as the amount of damages to be awarded. But we think that in this particular counsel overlook the distinction between the *power* to condemn, which confessedly resides in the state, and *proceedings* to condemn, which the state has delegated to its courts. The proceeding is certainly not deprived of its character as a suit by reason of its taking cognisance of this additional question; and if it be a suit, the right of removal attaches. Wherever a right is given by the law of a state, and the courts of such state are invested with the power of enforcing such right, the proceeding may be removed to a federal court if the other requisites of removability exist.

The motion to remand must be denied, and the case will proceed in the manner provided for in the state statute.

Nature of Removable Suits.—The opinion of the principal case fully accords with the previous rulings of the courts, on the points involved, and contains a very clear statement of the proper construction of the federal removal act as to the nature of a removable suit. The language of the several removal acts concerning the nature of the suit is quite broad. Sect. 639, of the Act of 1866, provides for the removal of "*any suit * * wherein the amount in dispute * * exceeds the sum or value of five hundred dollars,*" and, of course, there must be either diversity of citizenship of the parties to the suit, or its determination must depend upon the construction of a federal law. "*Any suit of a civil nature at law or in equity,*" is the language of sect. 3 of the Removal Act of March 3d, 1875; the language of either act being broad enough to embrace all suits

of a civil nature where the sum in dispute exceeds \$500, unless it was not contemplated by Congress that the federal courts should have jurisdiction of certain causes which, from their peculiar nature, belong exclusively to the state courts. The nature of the controversy is not essential to determine the question of removability, for the right of removal arises from the laws of Congress alone. This proposition, although at first doubted, is now well established. State legislation cannot impair the jurisdiction of the federal courts over controversies between citizens of different states: *Hyde v. Stone*, 20 How. 175; *Suydam v. Broadnax*, 14 Pet. 67; *Union Bank v. Jolly's Administrators*, 18 How. 503. "All cases which fall within the ordinary notion of an action at law, or contract, or tort, or of a suit in equity, are undoubtedly embraced by the lan-

guage" of the removal acts: Dillon on Removal, 3d ed. p. 49, sect. 41.

Test of Removability.—Is there a controversy between citizens of different states, is the controlling question. The general principle applicable is that a controversy between citizens is involved in a suit whenever any property or claim of the parties, capable of pecuniary estimation, is the subject of the litigation, and is presented by the pleadings for judicial determination. This rule was laid down in *Gaines v. Fuentes*, 92 U. S. 20, and has been subsequently reaffirmed: *Boom Co. v. Patterson*, 98 U. S. 403; *Northern Pacific Terminal Co. v. Lowenberg*, 18 Fed. Rep. 339 (U. S. Cir. Ct. Dist. Oregon). If such a controversy is involved, this constitutes a suit within the meaning of the removal act, and may be transferred to the federal courts, provided, of course, that the suit is between citizens of different states, or there is a federal question involved, and the amount in dispute exceeds \$500, notwithstanding that it may have been brought in a state court of limited jurisdiction: *Gaines v. Fuentes*, *supra*; Dillon on Removal of Causes, 3d ed., p. 60, sect. 48. But see *Rathbone Oil Co. v. Rauch*, 5 West Va. 79, where it is held that no motion to remove a cause can be made before a justice of the peace, for the reason that this is not a state court within the meaning of the law of Congress. The act reads "any state court."

Condemnation Proceedings.—This question has been more frequently contested, perhaps, in condemnation proceedings than in any other kind of cases, and several close points have been raised as to the propriety or right of the federal courts to assume jurisdiction of such proceedings.

1. It has been urged that such are not judicial proceedings; that the exercise of the right of eminent domain belongs exclusively to the state, and that the fact that it is delegated by the state legislature to corporations does not give the

proceedings a judicial character. This reasoning is specious. In all such proceedings there is necessarily a contest between the party seeking to condemn and the owner of the property. The necessity of the taking and the value are always involved. These questions are to be referred to some tribunal which, in determining them, necessarily exercises judicial powers, whatever be the nature of such tribunal in other respects. It adjusts the rights of the parties, standing adversely to each other. This is understood to be the province of a court of justice: A "court is a place where justice is judicially administered," and a controversy of this kind presents all the features of a proper case for the judicial administration of justice. And it can make no difference, so far as its judicial capacity is concerned, whether it determines the questions of law or fact as they arise, or, under the particular state law, it refers them to a jury, commissioners, or referees. It is the tribunal which acts. It is the practice of many important state courts to refer cases. And the referee determines both questions of law and fact, subject to the approval of the appointing court. Nor does the fact that the state may, through its legislative department, directly appropriate private property, destroy the judicial character of the tribunal it has designated to assume control of such proceedings, when such tribunal is acting. See *Port Huron, &c., Rd. v. Voorhies*, 50 Mich. 506; *Toledo, &c., Rd. v. Duntap*, 47 Mich. 456, 462; *In re N. Y. Cent. Rd.* 66 N. Y. 407, 409, where this objection is fully considered.

2. And it has been contended, that, although this is a proceeding partaking of a judicial nature, yet not a judicial proceeding in the ordinary sense, hence not a "civil suit" as contemplated by the removal act.

3. It has also been urged that this is virtually a proceeding between the state and the party seeking to condemn, there-

fore not subject to the federal jurisdiction.

Illustration Cases.—The cases fully answer these objections. *City of Chicago v. Hutchinson et al.*, 15 Fed. Rep. 129; s. c. 23 Am. Law Reg. 730, was a proceeding by the city of Chicago to condemn land for a public street, in the Superior Court of Cook county, against the various owners. Upon application of a non-resident landowner, the controversy between her and the city was removed to the federal court.

In *Warren v. Wisconsin Valley Rd.*, 6 Biss. C. C. 425, the railroad company instituted proceedings to condemn land under the Wisconsin statute. The damages were appraised by commissioners appointed by the court. The landowner appealed to the state Circuit Court. Under the statute, the appeal when properly perfected, "shall be considered an action pending in court," the appeal shall be tried by a jury unless waived, and judgment shall be rendered thereon according to the rights of the parties. This was held to be a suit of a civil nature, and removable within the act of Congress.

In *Northern Pac. Terminal Co. v. Lowenberg*, 18 Fed. Rep. 339 (Cir. Ct. D., Oregon), suit was commenced in the state Circuit Court of Oregon to appropriate land for the use of the railroad company. Under Oregon laws, a proceeding to condemn land is to be tried substantially the same as other civil actions. See Gen. Laws of Oregon, p. 533, sects. 42-52, Deady & Lane's ed. The cause was held removable. DEADY, J., observed (p. 342): "There is nothing in the nature or purpose of this action to prevent its removal to this court. It is an action brought against the owner of private property for the purpose of obtaining it to use it in the construction and operation of a railway, and at the same time ascertaining the value of such right or the amount that ought to be paid therefor. The statute under which it is

brought provides, in effect, that it shall be commenced and proceeded in the final determination in the same manner as an ordinary action of law. The plaintiff's right to appropriate private property to its use, and the money value of such use, are in their nature proper subjects of judicial inquiry. * * * And (p. 343) the mere fact that the plaintiff derives its right to appropriate private property to its use in virtue of the right of eminent domain, is altogether immaterial. In granting this right to the plaintiff, the state has seen proper to impose the condition that in case of a controversy between it and the owner of private property, as to the right of appropriation, or the value thereof, resort must be had to a judicial proceeding to determine it. And of course such proceeding, when instituted, is subject to the usual incidents of an ordinary action or suit, including the right of removal. In this respect it stands in exactly the same category as an action of ejectment to recover possession of the same premises."

In *Boom Company v. Patterson*, 98 U. S. 403, the proceeding was to condemn land. Under the Minnesota statute (where land was located), the method of condemning land is, to apply to the District Court of the county where the land is situated for the appointment of commissioners to appraise its value and take proceedings for its condemnation. The landowner is to be properly notified, &c. If the award of the commissioners is unsatisfactory, either party may appeal to the District Court, where the proceeding is to be entered by the clerk, "as a case upon the docket" of the court; and the persons claiming an interest in the land, to be designated as plaintiffs, and the company seeking to condemn, as defendant. The court is then to "proceed to hear and determine the case." Issues of fact are to be tried by a jury, unless a jury be waived. The amount so found as the value of the land is to be

entered as a judgment against the company, which is subject to review by the Supreme Court of the state, on a writ of error. Mr. Justice FIELD, in speaking for the court, said (p. 406): "If that inquiry (referring to condemnation) takes the form of a proceeding before the court between parties, the owner of the land on the one side, and the company seeking the appropriation on the other, then it is a controversy subject to the ordinary incidents of a civil suit." * * *

"The proceedings in the present case before the commissioners appointed to appropriate the land, was in the nature of an inquest to ascertain its value, and not a suit at law in the ordinary sense of those terms. But when it was transferred to the District Court by appeal from the award of the commissioners, it took, under the statutes of the state, the form of a suit at law (p. 407), and was thenceforth subject to its ordinary rules and incidents. The point in issue was, the compensation to be made to the owner of the land; in other words, the value of the property taken. No other question was open to consideration in the District Court: *Turner v. Holleran*, 11 Minn. 253. The case would have been in no essential particular different had the state authorized the company by statute to appropriate the particular property in question, and the owners to bring suit against the company in the courts of law for its value. That a suit of that kind could be transferred from the state to the federal court, if the controversy were between the company and a citizen of another state, cannot be doubted. And we perceive no reason against the transfer of the pending case that might not be offered against the case supposed." * * * The court also refers to *Gaines v. Fuentes*, *supra*, and approves the ruling therein; concludes with the following language: "Within the meaning of these decisions, we think the case at bar was properly transferred to the Circuit Court. and that it had

jurisdiction to determine the controversy."

Probate Proceedings.—It has been questioned whether the federal courts may acquire jurisdiction of probate proceedings under the removal act, it being insisted that they are matters exclusively within the jurisdiction of the state courts, and that Congress never intended to draw these matters to the federal courts; and, even if such is the intention, Congress has no power to do this. But the federal courts have always asserted their authority to determine such controversies, and place them upon the same footing concerning the right of jurisdiction, as ordinary civil suits, proceeding upon the principles heretofore stated.

In the leading case of *Gaines v. Fuentes*, 92 U. S. 10, the action was brought to annul a will, and to recall the decree by which it was probated, and was instituted in a state court of Louisiana which had jurisdiction over the estates of deceased persons. Mr. Justice FIELD, in giving the opinion, made the following observation, p. 19: "This act (the removal act), covers every possible case involving controversies between citizens of the state where the suit is brought and citizens of other states, if the matter in dispute, exclusive of costs, exceeds the sum of \$500. It mattered not whether the suit was brought in a state court of limited or general jurisdiction. The only test was, did it involve a controversy between citizens of the state and citizens of other states, and did the matter in dispute exceed a specified sum?" *Payne v. Hook*, 7 Wall. 425, is an instructive case upon this question. The suit was a proceeding in equity against an administrator brought by one of the distributees, a citizen of Virginia, to obtain her distributive share in the estate, in the United States Circuit Court for the District of Missouri. The jurisdiction of the federal court was contested on the ground that because of the peculiar structure of the Missouri probate system

such a proceeding could not be maintained in any other than the probate court of that state. But it was held that such a proceeding was cognisable in the federal court; that the United States Circuit Court for any district embracing a particular state will have jurisdiction of an equity proceeding against an administrator; "that the equity jurisdiction conferred on the federal courts is the same that the High Court of Chancery in England possesses, is subject to neither limitation or restraint by state legislation, and is uniform throughout the different states of the Union." See *United States v. Howland*, 4 Wheat. 108; *Green's Administrator v. Creighton*, 23 How. 90; *Robinson v. Campbell*, 3 Wheat. 212; *Pratt v. Northam*, 5 Mason 95; *Williams v. Benedict*, 8 How. 107; *Vaughan v. Northup*, 15 Pet. 1; *Tarver v. Tarver*, 9 Id. 174; *Gaines v. Cheas*, 2 How. 619; *Case of Broderick's Will*, 21 Wall. 503; *Barry v. Mercein*, 5 How. 103; *Craigie v. McArthur*, 4

Dillon 474; *Burts v. Loyd*, 45 Ga. 104; *Hargroves v. Redd*, 43 Id. 143; *Gaines v. New Orleans*, 6 Wall. 462; *Gaines v. Hennen*, 24 How. 553; *Mallett v. Dexter*, 1 Curtis C. C. 178. But see *DuVivier v. Hopkins*, 116 Mass. 125, which hold that a proceeding to establish a claim against the estate of a deceased person, which was had before a commissioner appointed by the probate court, which proceeding, at the time of the application for removal, was pending, on appeal, from such commissioner, in the superior court, could not be removed. Application for the probate of a will cannot be removed. *In re Frazer*, 6 Cir. Mich. 1878; 18 Alb. L. J. 353; s. c. 7 Cent. L. J. 227.

Ellis v. Davis, 109 U. S. 485, fully sustains the ruling of *Gaines v. Fuentes*, *supra*. Mr. Justice MATTHEWS, in an elaborate opinion, fully reviews the cases.

EUGENE MCQUILLIN.

St. Louis, Mo.

Prerogative Court of New Jersey.

GANS v. DABERGOTT.

Although a statute authorizing the grant of letters of administration to creditors upon failure of relatives to apply in a specified time, contains no provision for notice to the relatives, the Orphans' Court may by rule require previous notice to relatives, and in such case, letters granted without such notice are invalid.

APPEAL from decree of Essex Orphans' Court.

J. W. Field, for appellant.

A. W. Rosinger, for respondent.

The opinion of the court was delivered by

RUNYON, Ordinary.—Paul Dabergott, who was a resident and inhabitant of the city of Orange, in Essex county, died at sea September 1st, 1884, leaving a widow (the respondent) in Orange, where he carried on his business. He died intestate. His widow did not take out nor apply for letters of administration upon his estate within fifty days from his death. On the 28th of October,

1884, fifty-seven days after Mr. Dabergott's death, Isaac Gans, of Orange, claiming to be a creditor of the estate, made application for and obtained letters of administration. The widow had not then applied for letters, nor had she renounced her claim to administration. Nor did she request that Mr. Gans should be appointed. By his petition, Mr. Gans stated that the widow resided in Orange. No notice was given to her of the application, nor had she any knowledge of it. The letters were granted on the same day on which the petition was filed. On the 15th of November, 1884, the widow appealed, to the Orphans' Court of the county, from the order of the surrogate, granting the letters. Mr. Gans, having been duly cited, and the appeal heard, that court reversed the order of the surrogate, and revoked the appointment of Mr. Gans, and granted letters to Mrs. Dabergott. From that order Mr. Gans appealed to this court. The letters to Mr. Gans were issued in disregard of the provisions of the rule of the Orphans' Court on the subject. The first rule provides that where the application for letters of administration is by a person other than the next of kin or person first entitled, or by one of several equally entitled, the applicant shall produce to the surrogate the renunciation and request of the persons entitled to letters, that letters be issued according to the application, or proof that at least ten days' notice has been given to the next of kin or parties by law entitled to the administration, if any, of the application, and that the renunciation and request, if any, shall be recorded in a book to be kept for the purpose. The appellant's counsel insists that the ninth section of the "act concerning executors and the administration of intestate's estates" (Rev. 397), provides for the issuing, without notice, of letters of administration upon the estate of any intestate dying within this state to any fit applicant where the decedent leaves no relations entitled to administration, or where he leaves any, and they do not apply for letters within fifty days after his death. It is true the act is silent on the subject of notice, but the rule applies, and makes notification to, or renunciation and request by those first entitled to letters, a prerequisite to the grant of letters to any other person. The order appealed from will be affirmed, with costs, to be paid by the appellant.

A court cannot, by the adoption of a rule, deprive a party of a constitutional right, as a trial by jury; *Hinchly v. Machine*, 3 Gr. 476; but a rule prescrib-

ing the mode of drawing the jury is valid; *State v. Boatwright*, 10 Rich. 407.

A rule providing that when proceed-

ings for a road have failed, another application for such road shall not be acted on for a year is valid: *Twamencin Road*, 10 Penn. St. 195; and a rule that petitions for roads shall only be presented at a regular term of the court, and not at an adjourned session, *Road in Little Britain*, 27 Penn. St. 69; and a rule that in certain cases the defendant shall mark on the margin of his plea, "by statute," *Bartholomew v. Carter*, 3 Mann. & Gr. 125; and a rule requiring appeals to be taken in six months where a statute prescribed nine months, *Meloy v. Squires*, 42 Md. 378; and a rule that a plea in abatement, if consisting of matter of fact not apparent in the face of the record must be verified. *Fogg v. Fogg*, 31 Me. 302; and a rule in chancery that no deposition shall be read unless it is filed with the clerk on or before the Saturday previous to the sitting of the court, *Maultsby v. Carty*, 11. Humph. 361; and a rule limiting the right of witnesses, subpoenaed and attending court in several cases at the same time to fees for mileage and attendance in one case only, *Meffert v. Dubuque, Rl. Co.*, 34 Iowa 430; and a rule that bail must justify either in the county where the defendant was arrested or where the action is pending, or where the bail reside—the statute providing that the bail must justify before a county judge, *Bonnell v. Eaterly*, 30 Wis. 549; and a rule requiring a bill of exceptions in a criminal case to be presented and settled within ten days after the verdict, *Haines v. Commonwealth*, 99 Penn. St. 410.

A rule cannot authorize the illegal admission of evidence, *Kennedy v. Meredith*, 3 Bibb 465; nor restrict the time within which a party may obtain the instruction of the court to the jury before they retire, *Bell v. North*, 4 Litt. 133; nor provide that the court would consider all questions decided by the court on the trial as reserved, without a formal exception taken at the time, *Kennedy v.*

Cunningham, 2 Metc. (Ky.) 538; nor allow a defendant in a divorce suit more than thirty days to answer, where a statute prescribes thirty days as the limit, *Fagebank v. Fagebank*, 9 Minn. 72; see *Meloy v. Squires*, 42 Md. 378; nor provide that an attorney of record cannot take an affidavit of service of a summons, where a notary, by statute, may take such affidavit, and the attorney of record was also a notary, *Youny v. Young*, 18 Minn. 90; nor provide that every material amendment shall be cause for a continuance, where the state provides that it may be cause, *Colhoun v. Crawford*, 50 Mo. 458; *Adams Express Co. v. Trego*, 35 Md. 47; *Hayward v. Ramsey*, 74 Ill. 372; nor require that a motion to dismiss an appeal should be made at the first term, where the appeal bond was void, *Pickett v. Pickett*, 1 How. (Miss.) 267; nor require that a motion in arrest of judgment must be made the day after the verdict is rendered, where the statute provided that a motion for a new trial must first be made and if denied, then a motion in arrest, and the defendant moved for a new trial after the verdict which was not overruled until the following day, *Wilkinson v. Daniel*, Wright 368; nor require that an application for a new trial must be made on the first Saturday after the trial of the cause, *Pawley v. McGimpsey*, 7 Yerg. 502; nor require a defendant to pay the plaintiff \$20 for the privilege of answering after his demurrer had been overruled, *People v. McClellan*, 31 Cal. 101; nor require a bill of exceptions to be prepared and signed before a motion for a new trial would be heard, *Emery v. Emery*, 54 Iowa 106; nor provide that unless the party's request to have the judge's charge reduced to writing be made at or before the beginning of the trial, it shall be deemed to have been waived, *Patterson v. Ball*, 19 Wis. 243; nor be inconsistent with a plaintiff's statutory right to locate the venue of his action, *Smith v. Danzig*, 64 How. Pr. 320; nor provide

that a plaintiff may enter a judgment for want of an appearance, although he has not as required by statute filed his declaration prior to the return-day of the writ, *Vanormer v. Ford*, 98 Penn. St. 177; nor permit an action *ex contractu* to be brought to trial out of its order on the docket, on the affidavit of the plaintiff, his attorney or agent, of a belief that the defence is made for delay, and notice to the defendant or his attorney, unless it be made to appear satisfactorily that the defence is made in good faith, *Fisher v. Nat. Bank of Commerce*, 73 Ill. 34; nor strike out a pleading party, *Rice v. Ehele*, 55 N. Y. 518; nor alter a statute which gives the plaintiff in an action pending the right to examine the adverse party on oath before service of the complaint, *Glennay v. Stedwell*, 64 N. Y. 120; nor

require a case for an appeal to be served within ten days after written notice of the decision or ruling, where the statute allows ten days after the entry of the judgment and notice thereof, "or within such time as may be prescribed by the rules of the court," *French v. Powers*, 80 N. Y. 146.

It has been held that a court's construction of its own rules may be reviewed on appeal, *Magill's Appeal*, 59 Penn. St. 430; *Rathbone v. Rathbone*, 5 Pick. 89; *Baker v. Blood*, 128 Mass. 545; *Wall v. Wall*, 2 Har. & Gil. 79; *Abercombe v. Riddle*, 3 Md. Ch. 320; *Muultsby v. Carty*, 11 Humph. 361; but see *Hughes v. Jackson*, 12 Md. 450; *Adams Express Co. v. Trego*, 35 Md. 47; *Gannon v. Fritz*, 79 Penn. St. 303.

JOHN H. STEWART.

Supreme Court of Minnesota.

WELSH v. WILSON.

The fact that one transacts his business in the building that is his dwelling does not divest it of its character as a dwelling, so as to make it lawful for an officer to break the outer door for the purpose of serving civil process against the owner.

No valid levy can be made by means of breaking into the dwelling of the defendant in the writ.

Where the sheriff makes an unlawful levy, and is sued for the trespass, it cannot be taken in mitigation of damages that, pursuant to such levy, he sold the goods, and paid the proceeds to the execution creditor.

MITCHELL, J., dissents on the ground that although the breaking is unlawful, the levy is not absolutely void, and damages can only be recovered for the breaking and not for the value of the goods.

APPEAL from a judgment of the District Court, Waseca County.

Colleston Bros., for respondent, Kate G. Welsh.

Lewis & Leslie, for appellant, Hugh Wilson.

The opinion of the court was delivered by

GILFILLAN, C. J.—Plaintiff occupied in Waseca a building one story high, of only one room. In this she, with her daughter, slept; and did upon a kerosene stove what cooking she did, but

usually got their meals at a restaurant. In it she also pursued her trade as a milliner, and kept in it for sale, and exposed for sale, a stock of millinery goods. It was fitted up like a store, with shelves, tables for counters, show-cases on the tables, and one in front, on and in which her goods were kept for sale. The defendant, sheriff of the county, having an execution against her property, went, about 10 o'clock in the morning, to the building, the door of which was then locked, put his hand through the window, a pane of which was broken, took the lock off the door, entered, and levied on and removed her goods.

The validity of the levy is only in question. The room must be taken to have been plaintiff's dwelling—her abode—not merely when closed to business, but at all times while she occupied it for her dwelling. The fact that she also used it to transact her business did not change its character in that respect. It being her dwelling, it was unlawful for the sheriff to break the outer door to effect an entrance for the purpose of serving civil process. This proposition has never been doubted, either in England or in this country. It is also well settled in this country—there being no authority to the contrary—that no valid levy can be made by means of such unlawful entry. We may, perhaps, regret that such is the rule; may be able to see that unfortunate consequences will sometimes result from it; but it is too firmly established to be disturbed except by act of the legislature. The levy being invalid, nothing which the sheriff did pursuant to it was valid. Every subsequent act based on the levy, and depending on it for its lawfulness, was but a continuation and aggravation of the original trespass. It can therefore be of no avail to the sheriff that he sold the goods and paid the proceeds to the execution creditor. In the cases where, as in *Howard v. Manderfield*, 31 Minn. 237, such subsequent appropriation has been allowed to operate in mitigation of damages, there has been a subsequent valid levy, not connected with the trespass, which gave validity to the sale and appropriation of the proceeds.

Judgment affirmed.

MITCHELL, J. (*dissenting*).—The doctrine that, if a civil officer open a dwelling-house by forcing the outer door for the purpose of levying upon the owner's goods, the levy is unlawful and *void*, rests wholly upon the authority of *Isley v. Nichols*, 12 Pick. 269, which other cases have merely followed. Although it may be presump-

tuous to question such eminent authority, yet I am unable to concur in the doctrine of that case. The object of the legal maxim, that a man's house is his castle, is the protection of the inmates, and not an immunity of goods from attachment on civil process.

The law in England seems always to have been that, although the sheriff cannot break defendant's dwelling by force of a *feri facias*, but is a trespasser in the breaking, yet the execution which he then doth in the house is good. Y. B. 18 E. IV., f. 4; Bacon's Abr. "Sheriff, N. E.;" *Semayne's Case*, 3 Rep. 93; *Lee v. Gansel*, 1 Cowp. 1. This seems to me to be on principle, and in its practical operation the better rule.

Inasmuch as the officer has been enabled to make the levy by means of his unlawful breaking, I do not deny that the levy may be *voidable*, so that the court might, on motion, made directly for that purpose, set aside the levy and thus place the parties *in statu quo*. But if the defendant allow the levy to stand, and sue for the trespass upon his dwelling, I do not think he can include in his damages the value of the non-exempt goods levied upon under the process. To allow this would not, in its practical results, place the parties *in statu quo*. If the trespasser is held liable for damages, actual and exemplary, for the breaking, I think this will sufficiently protect the inviolability of dwellings.

Looking at the matter from a practical standpoint, it seems to me that the doctrine of the opinion will often work badly. This seems to be virtually conceded by my brethren. And, the question being one of first impression in this state, I think we are at liberty to adopt the rule I have suggested.

When we first read this case the *dictum* in *Semayne's Case* at once occurred to us, and we at first thought that the dissenting opinion laid down the true rule of law. We have, however, taken the pains to examine the case reported in the Year Book, 18 Edw. IV., pl. 19, and other authorities dependent thereon, and have been compelled to change our mind and concede the correctness of the decision in the principal case. The case 18 Edw. IV., pl. 19, is translated thus: "Catesby came to the bar and showed how a *feri facias* was directed to the sheriff of Middlesex to make execution for one J., upon a recovery by

the said J. against one B.; and afterwards the said B. put all his goods into a chest, closed and locked; and afterwards the sheriff broke the door of the house, and entered the house and took the goods with him, &c. And whether the sheriff had done any wrong, &c? LITTLETON, and all his companions, held that the party might have a writ of trespass against the sheriff for the breaking of the house, notwithstanding the *feri facias*; for the *feri facias* shall not excuse him of the breaking the house, but of the taking of the goods only."

Upon the slender authority of the last clause of the last sentence above quoted,

which at best is meagre in detail and subject to very different constructions, depend all the subsequent cases favoring the views advocated in the dissenting opinion. *Semayne's Case*, 5 Co. 91; s. c. 1 Smith's Lead. Cas. (8th ed.), *183, and *Lee v. Gansel*, Cowp. 1, 6, are as to this point mere *dicta*, and Bacon's Abridgment, *Execution*, n. 7, depends for its authority entirely upon the *dictum* in *Semayne's Case*.

In the case of *Yates v. Delamayne*, Trin. T., 17 G. 3, Bac. Abr. *Execution*, n. p. 733, the court set aside an execution levied upon the defendant's goods in his dwelling-house, because the officer forcibly broke into the house to execute the writ.

The case of *Kerbey v. Denby*, 1 M. & W. 336, s. c. Tyrw. & Gr. 688, is important in this connection. This case was trespass for breaking and entering the plaintiff's dwelling-house and assaulting and imprisoning him, &c. The pleas were first, not guilty; secondly, as to all the trespasses alleged except the breaking of the house, a justification under a writ of *ca. sa.* and warrant thereon, by virtue of which the defendants entered the house—the outer door being open—and arrested the plaintiff. Replication (admitting the writ and warrant), *de injuria absque residuo causæ*. It was proved that the defendants, who were bailiffs, in execution of the warrant, broke open the outer door of the plaintiff's house, and so gained an entrance and arrested him. Upon this state of facts it was held, first, that the averment in the plea that the outer door was open was a material averment, for that the door's being open was a condi-

tion precedent to the defendant's right to enter and arrest the plaintiff in his house; and therefore that the plea was sufficiently traversed by the general replication, and it was not necessary to reply the breaking of the outer door; secondly, that the defendants having become trespassers *ab initio* by the breaking of the door, the jury were rightly directed that they might even on a plea of not guilty, give damages in respect of all the injuries complained of in the declaration.

In the United States the doctrine held by the majority of the court in the principal case is supported by the well-considered cases of *Ilseley v. Nichols*, 12 Pick. 270; *People v. Hubbard*, 24 Wend. 369; *Curtis v. Hubbard*, 1 Hill 536; s. c. 4 Id. 437; *Closson v. Morrison*, 47 N. H. 482; and upon the authority of these cases the doctrine of the principal case may be considered as settled in this country, as upon principle it ought to be; for it would seem to be clearly within the reason of the rule in the *Six Carpenters' Case*, 8 Co. 146, s. c. 1 Smith's Lead. Cas. *216, that if a man abuse an authority given him by the law, he becomes a trespasser *ab initio*.

The question involved is one of great practical importance in the ordinary administration of justice, and it is somewhat surprising that the question should not have been settled at a much earlier date. In this country, however, it can no longer be considered an open question; and we doubt whether the *dicta* in the old English authorities above cited would now be followed even in England.

M. D. EWELL.

Chicago, Ill.

United States Circuit Court, District of Kansas.

MEHRHOFF v. MEHRHOFF.

A married woman, in Kansas, can maintain an action in her own name for the alienation of the affections of her husband, and depriving her of his society, care, and support.

In an action by a wife to recover damages for the alienation of her husband's affections, a complaint alleging that defendants began systematically to poison and prejudice the mind of her husband by telling him false stories about her, and charging her with unwillingness and inability to do housework, and by treating her with gross disrespect in his presence, and finally by falsely and maliciously charging her in his presence with having committed adultery, is not sufficient, except as to the allegation as to the charge of adultery, and as to that it should be made more specific by stating the time and place where the words were spoken, and what words were used.

AT LAW. The opinion states the facts.

Day & Dodge and *Maher & Osmond*, for plaintiff.

H. D. McMullen and *Dieffenbacker & Banta*, for defendants.

The opinion of the court was delivered by

FOSTER, J.—The plaintiff sues to recover damages for an alleged violation of her marital rights, in this, to wit: that the defendants, who are the father and mother of William Mehrhoff, her husband, conspired to separate the plaintiff and her said husband, and to deprive the plaintiff of the care and society of her said husband, and alienate his affections from her; that, to accomplish the said purposes, the defendants began systematically to poison and prejudice the mind of her husband against her by telling him false stories about the plaintiff, charging her with unwillingness and inability to do housework, and by treating plaintiff in her husband's presence with gross disrespect, and finally by falsely and maliciously charging the plaintiff, in her husband's presence, with having committed adultery—by reason whereof, the affections of the plaintiff's husband were alienated from her, and caused him to treat her badly, and with such cruelty that she was compelled to take her infant child and flee from her husband's domicile in the night time, and that he has completely abandoned her and said child; that he has no property out of which she could be decreed alimony, etc., to her damage, \$5000. To the petition defendants file a general demurrer.

The main question presented in this case is this: Can a married woman maintain an action in her own name for the alienation of the

affections of her husband, and depriving her of his society, care and support? It must be said that no such right or action existed under the common law by reason of the legal unity of husband and wife. Has the legislation on the rights of married women in this state removed this barrier of the common law? In *Westlake v. Westlake*, 34 Ohio St. 621, this question is discussed at length under the statute of that state, and the court, by a divided bench (a majority of one), held that the wife could maintain her action. In *Logan v. Logan*, 77 Ind. 558, the court, by a majority of one, decided that under the statutes of Indiana the wife could not maintain an action, but the words being slanderous, she could maintain her action of slander. It will be observed from reading these cases that under both the statutes of Ohio and Indiana the right of a married woman to sue or be sued alone was restricted to certain subjects and causes of action. Under the statutes of this state the right of a married woman to sue and be sued is without restriction or limitation in terms. It reads as follows: "A woman may, while married, sue and be sued, in the same manner as if she were unmarried." St. 1879, chap. 62, sect. 3. The statute also protects her in the enjoyment of her separate real and personal property, and gives her the right to sell and convey such property, and make contracts in reference thereto, to the same extent as a married man in relation to like property of his own. It also authorizes her to carry on trade and business, and perform labor and service on her sole and separate account, and makes her earnings her sole and separate property, and gives her authority to invest the same in her own name, etc. Sects. 1-4, chap. 62, Laws 1879.

In reference to the matter of suing or being sued she stands on the same footing as the unmarried woman. For any violation of personal rights an unmarried woman has the same remedy that a man has. She may sue for an injury to her character, her person, or her property. A right of action to this extent is clearly given to a married woman under the statutes. *Furrow v. Chapin*, 18 Kan. 112; *Townsdin v. Nutt*, 19 Id. 284. Words imputing unchastity to a female give her a right of action for slander, and it seems to me that the provision of the statutes of Kansas was intended to and does liberate a married woman from the common-law disability, so far as to enable her to sue for any violation of her personal rights, as well as for injury to her property; and, in the words of the court in the case of *Westlake v. Westlake*, *supra* :

"If at common law the husband could maintain an action for loss of *consortium* of the wife, I can see no reason why, under our law, the wife cannot maintain an action for the loss of *consortium* of the husband." It is quite apparent by the language used that it is the intent of the statute that a woman, so far as the power to assert or maintain her rights in a court is concerned, should not be affected by coverture; and the law in that respect places her where she was before the marriage. It is true this right of action grows out of a relation only arising where the married relation exists, but I have but little doubt that it comes within the spirit and intent of the law, and that it was the purpose of the legislature to permit a married woman to sue for a violation of her personal rights, although such rights grow out of the marital relations.

It should be remarked, in conclusion, that it is very doubtful if the words or conduct imputed to the defendant are sufficient to base this action upon, with the exceptions of the words charging the plaintiff with adultery: *Lynch v. Knight*, 9 H. L. 577, cited in *Westlake v. Westlake*. As to this particular charge, the time and place and, if possible, the words spoken should be set out in the petition, so that the defendants may be informed exactly what charge they are required to meet.

The demurrer will be sustained as to the latter objections—that is, the insufficiency of the allegations in reference to the words spoken, as I have indicated—and overruled as to the other question, with leave to the plaintiff to amend within twenty days.

Supreme Court of Connecticut.

GRISWOLD v. N. Y. & N. E. RAILROAD COMPANY.

A condition in a free pass issued by a railroad company that the passenger will make no claim for damages for injuries caused by the negligence of the railroad's servants is a reasonable one, and will prevent a recovery of such damages even though the passenger was a minor and the injuries were caused by gross negligence on the part of the railroad employees.

The plaintiff was employed by the keeper of a restaurant at a railroad station to sell sandwiches on the train. While so employed he applied for and obtained a free pass, which, at the time of the accident, he was using to make a journey for his own pleasure and not for the purposes of his business. *Held*, that the pass could not be considered as issued for a consideration so as to give plaintiff the right of a passenger for hire.

W. C. Case and *P. E. Bryant*, for plaintiff.

S. E. Baldwin and *E. D. Robbins*, for defendant.

The opinion of the court was delivered by

LOOMIS, J.—The plaintiff's intestate, Charles P. Griswold, was a boy about seventeen, employed by the keeper of a restaurant at the defendants' station in Waterbury to sell sandwiches, fruits, &c., on all trains coming into Waterbury, having a free pass for that purpose between Hartford and Fishkill. His employment did not require him to travel as far east as Plainville, but his mother lived there, and he often went there to visit her. In July 1883, he was at Plainville for this purpose, and boarded a train bound thence for Hartford, in order to stop off at Clayton and look at the wreck of a train there caused by a collision the day before. The train had two passenger cars, and the conductor saw him on one of them just after the train started, but afterwards, without the conductor's knowledge, he went into the baggage car, and while there a collision occurred with another train coming westerly (there being but a single track), which wrecked the engine and baggage car and killed the intestate. He was at the time riding on a free pass which provided that the person accepting it assumed all risk of accident, and expressly stipulated that the company should not be liable, under any circumstances, whether of negligence of their agents or otherwise, for any personal injury.

The defence was placed on three independent grounds :

1st. The complaint was demurred to upon the ground that the action was brought for the sole benefit of the estate of the intestate, when it should have been for the benefit of the widow or heirs.

2d. That the intestate was guilty of such contributory negligence as would prevent recovery, and

3d. That at the time of the injury he was travelling on the defendant's train without the payment of any fare, under an agreement or condition expressly assuming all risk of accident, and stipulating that the defendant should not be liable in any event for injuries resulting from the negligence, &c., of its servants or otherwise.

As our views of the last question will be decisive of the whole case, we will confine our discussion to that and waive the other two questions.

Before we come to the discussion of the question whether, under

the conditions of the pass, the law will protect the defendant from liability, it will be necessary to determine whether the pass was gratuitous, or upon consideration, for if the latter is true, the defendants must be held to their full responsibility as carriers of passengers. The plaintiff contends that the pass was part of the consideration to induce Chickering to open a lunch-room in the defendants' station at Waterbury, but the finding is silent in regard to this, and we are not justified in assuming that it was an element in the negotiations, or was in the mind of either party. It was, on the other hand, obviously an afterthought, and when asked for by Chickering he did not refer to it as a thing promised by Holbrook or any one on behalf of the company. It was not claimed as matter of right under any contract duty but merely as matter of favor, and as such we must hold it to have been granted.

The question of consideration should be determined as in any other case of contract. The existence of some selfish motive (if any), impelling the act renders it none the less a gratuity in the eye of the law, if there was no obligation at all to furnish the pass. The restaurant business belonged exclusively to Chickering, whatever may have been the incidental benefits to the railroad company.

And besides, it is to be observed that at the time of the injury the intestate was not travelling at all in the interest of the restaurant, but solely to gratify a personal curiosity, which could by no possibility be any benefit direct or indirect to the railroad company; so that on the whole, we have no hesitation in calling his pass a pure gratuity. We have then a case where the defendants gave a free pass upon the express condition that the passenger would make no claim for damages on account of any personal injury received while using the pass, in consequence of the negligence of the defendants' servants. But the plaintiff, as the personal representative of the one receiving the pass, has instituted a suit in direct violation of the condition.

In ordinary transactions such a breach of good faith, to say nothing of the breach of contract, would be disgraceful, but there may be great considerations of public policy which will conceal the private features of the transaction and make the stipulation invalid in the eye of the law.

By the English decisions, it is clear that the carrier has full power to provide by contract against all liability for negligence in such cases: *McCowley v. The Furness Ry. Co.*, L. R., 8 Q. B.

57; *Hall v. N. E. Ry. Co.*, Id. 437; *Duff v. The Great N. Ry. Co.*, L. R., 4 Irish Common Law 178; *Alexander v. Toronto & Nepessing Rd. Co.*, 33 Upper Canada 474. (This last case is almost identical with the one at bar.)

In the United States we find much contrariety of opinion. Some state courts of the highest authority follow the English decisions and allow railroad companies in consideration of free passage to contract for exemption from all liability for negligence of every degree, provided the exemption is clearly and explicitly stated: *Wells v. N. Y. Cent. Rd.*, 26 Barb. 641, and same case 24 N. Y. 181; *Perkins v. Rd.*, Id. 208; *Bissell v. N. Y. Cent. Rd.*, 25 Id. 442; *Poucher v. N. Y. Cent. Rd.*, 49 Id. 263; *Maguin v. Dinsmore*, 56 Id. 168; *Dorr v. N. J. Steam Nav. Co.*, 1 Kernan 486; *Kinney v. Central Rd.*, 32 N. J. L. 409, and 34 Id. 513; *Western and Atlantic Rd. v. Bishop*, 50 Ga. 465.

Other courts also of high authority concede the right to make such exemption in all cases of ordinary negligence, but refuse to apply the principle to cases of gross negligence: *Ill. Cent. Rd. Co. v. Reed*, 37 Ill. 484; *Ind. Cent. Rd. v. Mundy*, 21 Ind. 48; *Jacobus v. St. Paul & Chicago Rd.*, 20 Minn. 125.

And other state courts of equal authority utterly deny the power to make a valid contract exempting the carrier from liability for any degree of negligence: *Rd. v. Curran*, 19 Ohio St. 1; *Mobile & Ohio Rd. v. Hopkins*, 41 Ala. 486; *Penn. Rd. Co. v. Henderson*, 51 Penn. St. 315; *Flinn v. Wilmington, &c., Rd. Co.*, 1 Houst. (Del.) 469.

The Supreme Court of the United States in *Rd. Co. v. Lockwood*, 17 Wall. 357, where a driver had a free pass to accompany his cattle on their transportation, *held*, in opposition to the New York and English cases, that the pass was not gratuitous, because given as one of the terms for carrying the cattle for which he paid.

The reasoning of BRADLEY, J., was directed so strongly to the disparagement of the New York decisions that it might have indicated an opposition to the principle of those cases in other respects, had not the opinion concluded with this distinct disclaimer: "We purposely abstain from expressing any opinion as to what would have been the result of our judgment had we considered the plaintiff a free passenger instead of a passenger for hire." The reasoning and the conclusions of the court therefore must be considered

as all based on the assumption that the passenger paid for his passage.

The conclusions of the court were :

First. "That a common carrier cannot lawfully stipulate for exemption from responsibility, when such exemption is not just and reasonable in the eye of the law.

Secondly. "That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for negligence of himself or his servants."

We are not disposed to attempt to controvert the soundness of these propositions as applicable to passengers for hire, but it remains an open question, What is reasonable in the case of a free passenger? Will a just sense of public policy allow any distinction? It seems to us the two cases cannot be identical in the eye of the law or of public policy, but that there is ample ground for a distinction.

In the first place, the arrangement between the parties ought not to be regarded as a contract with the railroad company in its character as a common carrier, and therefore the stipulated exemption is no abdication of that rigid responsibility which the law imposes on common carriers.

The gratuitous accommodation concerns only the immediate parties, unless in a very indirect way, by making the fare of other passengers higher. If, however, fares are unreasonable, they may be subject to governmental regulation. But it will suffice to say that the remote and indirect effect alluded to cannot make the exemption void on the ground of public policy. Many other gratuities and charities might be named, which, though conceded to be commendable, would have a similar effect.

Again, in *Rd. Co. v. Lockwood*, *supra*, and in other cases advocating the same doctrine, one prominent reason given for holding the contract void as opposed to public policy, is that in making the contract the carrier and his customer do not stand on a footing of equality; that the latter is only one individual against a powerful corporation, which has him in its power, and that he cannot afford to higggle in regard to terms. It is manifest that this reasoning has no application at all to a free passenger.

If his position is not superior, it is at least equal, to that of the railroad company. The latter will not often be found urging the acceptance of free passes. There is no possibility of any "higgling" on the part of the passenger for more favorable terms, and the

solicitation for the pass itself will come from the latter also. Under these circumstances it does not seem reasonable to add to a free gift of transportation the burden of insuring the passenger against all personal injuries arising from the negligence of the carrier's servants, the risk being well known and willingly assumed by the passenger, as the condition upon which the gift is made.

But it may be suggested that there is involved in negligence, especially where the safety of life is concerned, a moral as well as legal culpability which renders such contracts of exemption void as against public policy. But those who regard this argument as decisive must, it seems to us, overlook the fact that there may be, and very often is, negligence that would be called gross on the part of servants, for which there is no moral culpability at all on the part of the master. The parties contracting for the exemption under consideration well know that railroad passengers are continually exposed to risks arising from some momentary lapse of memory or attention on the part of servants who have gained a high reputation for skill, prudence and carefulness, and who were, it may be, selected on that account. A large percentage of accidents will be found to have resulted in the way suggested without any actual fault on the part of the officers of the corporation. Now the finding in the case at bar is explicit, that the injury to the plaintiff's intestate resulted from the gross negligence of the defendant's servants. This restriction is exclusive, and is to be understood as used in contradistinction to negligence on the part of the corporation itself through the acts of those who properly represent it.

By the rule of *respondeat superior* a corporation is made liable for the negligence of its servants, but where the principal has done the best he could the rule is technical, harsh and without any basis of inherent justice. As applicable ordinarily to corporations it is of great practical convenience and utility. We do not therefore advocate its abolition, but we contend that in a case like the present, where there is no actual blame on the part of the principal, it is reasonable, in the eye of the law, that the party for whose benefit the rule is given should be allowed to waive it in consideration of a free passage. It is not the case where a party stipulates for exemption from the legal consequences of his own negligence, but one where he merely stipulates against a liability for imputed negligence, in regard to which there is no actual fault.

It is easy to see, therefore, that considerations of public policy have no application to such a case.

Where a master uses due diligence in the selection of competent servants, and furnishes them with suitable means and machinery to perform the service in which he employs them, he is not answerable to one of them for an injury received in consequence of the negligence of another fellow-servant while both are engaged in the same service. Here the rule of *respondeat superior* is waived, and it is generally put on the ground of implied contract. And if a waiver may be implied in such case why not give effect to an express agreement in the case of a free passenger.

The Roman law, with its clear sense of justice, made a distinction similar to the one for which we contend, in determining the liability of the mandatory for the negligence of his agents. Where the business of the mandatory required the interposition of sub-agents, he was liable for the negligence of such sub-agents only on the ground of *culpa in eligendo*, supposing he knew or could have known their inadequacy.

The foregoing reasoning, as it seems to us, will also furnish a complete answer to the claim that the defendant must be held liable on account of the gross negligence of their servants, for it is manifest that the principal is no more culpable in one case than in the other; and the rule of *respondeat superior* being waived, the protection is complete.

The word "negligence" in the stipulation for exemption is used in its generic sense and comprehends all degrees.

And we may add that some high modern authorities have expressed strong disapprobation of any attempt to fix the degrees of diligence or negligence, because the distinction is too artificial and vague, for clear definition or practical application. See the opinion of the court in *Railroad Company v. Lockwood*, 17 Wall. 382, and cases referred to in a note on p. 383.

The only remaining question to be considered is, whether the minority of the plaintiff's intestate, which rendered him incapable generally of making contracts, will render his assent to the limitation or condition of the pass void also.

But a minor has capacity in law to accept free gift, either absolute or conditional. If the condition or limitation is reasonable, he cannot accept the gift and reject the condition or limitation; for

that would enlarge the gift, which of course cannot be done without the consent of the donor.

If the intestate did not like the gift as made, he should have declined to accept it and not attempt (as his personal representative is doing) to make it include in effect, contrary to its terms, an insurance against risks arising from the negligence of the defendants' servants.

There was error in the judgment complained of, and it is reversed and the case remanded.

In this opinion the other judges concurred.

LEGAL NOTES.

THE Supreme Court of the United States has recently reversed the decision of the United States Circuit Court for the Southern District of Mississippi, which had declared the Mississippi Railroad Commission Act unconstitutional (in *Farmers' Loan and Trust Co. v. Stone*, 20 Fed. Rep. 270. See also, 23 Am. Law Reg. N. S. 476). This decision of the Supreme Court is one of the most important which that tribunal has delivered, in that it goes far towards settling the controversy upon the right of the states to regulate railroad traffic. It may be considered as a supplement to the famous *Granger Cases* in 1876 (94 U. S. 113). The opinions being too long to publish in full, an abstract is here given. The facts are these: The Mississippi Railroad Commission Act of 1884 enacts, that the commissioners shall revise the tariffs of all the railroads in that state, and fix rates which shall be a fair and just return on the value of the railroad property; that they shall require from the railroads information as to the management of their lines; that they shall investigate accidents; shall see that depots and waiting-rooms are adequate and suitable; shall bring suit in the name of the state against railroads violating any provision of the act, which suits cannot be dismissed without the consent of both the court and the commission. A penalty of \$500 follows the violation of the act. Any determination by the commission shall be *prima facie* evidence that the same is right and proper.

A supplemental act provides, that traffic from outside to outside the state shall not be interfered with. Such is the outline of the act.

The Mobile and Ohio Railroad had charters from several states and land grants from the United States, the object being to make a through line of communication from the Gulf to the Great Lakes. By its Mississippi charter the company had "full power to prescribe such by-laws, rules and regulations as they shall deem proper, not contrary to this charter or the laws of this state or of the United States." It had also power, "from time to time, to fix, regulate and receive the toll and charges by them to be received."

Suit was brought to enjoin the commission from proceeding, on the ground that the act under which they claimed authority; (1) impaired

the obligation of a contract ; (2) regulated interstate traffic ; (3) denied to the railroad company the equal protection of the laws, and deprived it of its property without due process of law ; (4) conferred both legislative and judicial powers upon the commission, and (5) was void on its very face by reason of inconsistencies and uncertainties.

The judgment of the court, delivered by the Chief Justice, is in substance as follows :

The power of regulating railroad charges is a continuing power, to be bargained away, if at all, only by words of positive grant, which are not to be found in the present instance. Every presumption is against such bargaining away.

The grant in the charter implies authority to charge reasonable rates. The legislature is the judge of what this reasonableness is.

The decision of the state court upon the same act in the case of another company (*C. Railroad Co. v. Y. & M. Railroad*, 62 Miss. 607), holding that the power of the state had been surrendered where the charter prescribed maximum rates, is not in conflict with the present decision.

As to interstate commerce, the fact that the Mobile and Ohio Railroad was intended as a great interstate avenue of commerce, does not make any difference. The state has power over her corporations, within her own borders, so long as she does not regulate interstate commerce. Under the act the commissioners may do much which is not interference with interstate traffic. As yet they have done nothing. The presumption is that they will not exceed their constitutional authority, and it will be time enough to interfere when they do. It is difficult to lay down a general rule as to what constitutes interference on the part of a state with interstate traffic.

General statutes regulating railroads, unless forbidden by contracts in the charter, do not take away from the corporation the equal protection of the laws, nor deprive it of its property without due process of law.

The object of this statute is to regulate rates and enforce certain regulations of police.

In its general scope and aim it is constitutional. Questions may arise upon it which may safely be left for consideration until they are presented.

Mr. Justice HARLAN dissented, not denying the right to create railroad commissions, but distinguishing the present from cases where the constitution of the state, or the charter itself, reserved to the state a right of amendment or repeal, and holding that in the present instance the charter contained a contract permitting the company to regulate its rates within what was reasonable ; of which reasonableness the courts, not the legislature, should judge.

As already remarked this decision is a highly important one. Important, first, as marking a turning point in the legal contest which has been waged for the last ten or fifteen years between the states and the corporations, the former relying upon the maxim that the corporation cannot be greater than the power which has created it, and the latter invoking the authority of the *Dartmouth College Case*. On the part of the corporations the claim was raised, that if the company had chartered power to fix rates, nothing but an express reservation in the same charter could deprive it of that exclusive power. The *Granger Cases* decided

that a reservation in the state constitution, or by statute prior to the charter, would have the same effect as a reservation in the instrument; but the reasoning of Mr. Justice WAITE pretty well indicated that the Supreme Court would not stop there. Accordingly this case decides that nothing short of a plain renunciation in the charter will bar the paramount power of the state. Whether this plain renunciation must be in actual words, or may arise by necessary implication, is the one point in this controversy still to be settled. For while on the one hand the chief justice seems to approve of the Mississippi state court's ruling, that a schedule of maximum rates in the charter of a railroad is an implied contract by the state not to prescribe lower rates, on the other hand he hints at a doubt whether the police power of regulation can be bargained away at all by the state.

If the latter be the true principle, then there is but one restraint on the power of the states to fix railroad rates—such rates may not be tantamount to confiscation and destruction.

This decision is progress towards a definition of that undefined and almost undefinable attribute of sovereignty—the police power of the states. This power is admitted to sanction regulations for the safety and convenience of those who, as travellers or otherwise, do business with railroads. It could not be said hitherto that the police power reached to the protection of the pockets of the public—to the regulation of railroad charges.

This decision is important, again, on the subject of interstate commerce, since it disposes of the ingenious—for it is no more than ingenious—argument that a line chartered and built as a through route, is less subject to state control, in the matter of local commerce, than merely local roads or roads pieced together into a through line. However difficult its application, the rule of law is clear—interstate commerce may not be interfered with by the states, even in the absence, as at present, of national legislation, but, until Congress acts, state regulation of local traffic may “incidentally” and “indirectly” affect interstate traffic.

This decision is important, finally, as the first in which a railroad commission law has, in its entirety, come up before the Supreme Court for review. The attitude of the court towards railroad commissions is clearly indicated.

While admitting that undue and unconstitutional powers may be reposed in them, railroad commissions, even the more stringent ones, are, on the whole, sanctioned as a legitimate means of legitimate legislative control.

CHARLES CHAUNCEY SAVAGE.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹SUPREME COURT OF ARKANSAS.²COURT OF CHANCERY OF NEW JERSEY.³SUPREME COURT OF OHIO.⁴SUPREME COURT OF SOUTH CAROLINA.⁵ACKNOWLEDGMENT. See *Deed*.

ACTION.

Building Contract—Payment conditioned on Certificate.—Under a building contract containing a clause that the work shall be done under the direction and to the satisfaction of a particular person, to be testified by a writing or certificate under his hand, no right to the money earned under the contract accrues, and no action can be maintained to recover it until the certificate is procured or the contractor is entitled to it: *Kirtland v. Moore*, 40 N. J. Eq.

ASSIGNMENT.

Order on Debtor.—An order drawn by a creditor on his debtor, directing the payment of a sum of money out of a specified sum, and which is presented to the debtor, though not accepted, constitutes a good assignment in equity: *Kirtland v. Moore*, 40 N. J. Eq.

ATTACHMENT.

Goods of Third Party Seized—Damages.—Under an attachment of A. against B. the officer seized goods of C. and returned an inventory and appraisal of them. The goods were sold under an interlocutory order of the court, and afterwards the attachment was dissolved and the proceeds of the sale, less cost, were returned to C. He then sued the surety in the attachment bond for damages. *Held*, That as he was not a party to the suit nor estopped by his acceptance of the proceeds paid to him, he was not bound by the officer's return as to the amount or value of the goods, but should recover the true value of all the goods actually taken, less the amount of the proceeds paid to him: *Straub v. Wooten*, 45 Ark.

BAILMENT. See *Innkeeper*.

BANKRUPTCY.

New Promise—Exemption.—A new promise to pay a debt discharged by bankruptcy is not an original and independent contract, but revives

¹ Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term, 1885. The cases will probably appear in 116 U. S. Rep.

² From B. D. Turner, Esq., Reporter; to appear in 45 Ark. Rep.

³ From John H. Stewart, Esq., Reporter; to appear in 40 N. J. Eq. Rep.

⁴ From George B. Okey, Esq., Reporter; to appear in 44 Ohio St. Rep.

⁵ From Robert W. Shand, Esq., Reporter; to appear in 23 South Carolina Rep.

the old debt; and where the debt was contracted under the constitution of 1868, and the new promise was since the constitution of 1874, the exemptions under the constitution of 1868 apply: *Nowland v. Lanagan*, 45 Ark.

BILLS AND NOTES.

Drawer—Liability of—Parol Evidence.—By the act of drawing a bill of exchange the drawer contracts that it will be accepted and paid according to its terms, and that if it is not he will pay it: *Cummings v. Kent*, 44 Ohio St.

Evidence of a parol agreement, prior to or contemporaneous with the drawing and delivery of a bill of exchange, that the drawer is not to be liable as such, is inadmissible: *Id.*

CONFLICT OF LAWS.

Suit between Parties out of Jurisdiction—Corporations.—In a suit brought by stockholders of a foreign corporation against that corporation and another corporation to which it had leased its road, lands, &c., all of which are out of this jurisdiction, seeking relief in regard to the transactions of those corporations with each other, the court, on demurrer, declined to take jurisdiction, on the ground that the courts of New York were the proper forum for the litigation: *Gregory v. N. Y., L. E. & W. Rd. Co.*, 40 N. J. Eq.

Suit by Legatee under Will proved in Foreign Jurisdiction.—The complainant claimed that, as a residuary legatee, he was entitled to a part of a fund in defendants' hands, under what the complainant insisted was a void bequest. *Held*, that as the testator was at the time of his death a non-resident (he lived in New York, where his will was proved), and his will had never been proved in this state, nor recorded here, as authorized by the statute, the complainant was not entitled to relief, although the bill states that the fund is under the control of the defendants, who reside in this state and are the executors of the surviving executor of the will by which the bequest was made: *Van Gieson v. Banta*, 40 N. J. Eq.

CONSTITUTIONAL LAW. See Criminal Law.

Regulating the Bearing of Arms, &c.—Police Power.—Sections 5 and 6 of article 11 of the Military Code of Illinois, prohibiting any body of men, other than the organized militia of the state and troops of the United States, from parading with arms in any city of the state without a license from the governor, do not infringe the right of the people to bear arms, and clearly do not conflict with the 2d Amendment to the Constitution of the United States; that amendment being a limitation only upon the power of Congress and the national government. It is undoubtedly true, that all citizens capable of bearing arms constitute the reserved militia of the United States, as well as of the states, and therefore the latter cannot prohibit the people from bearing arms, so as to deprive the United States of their rightful resource for maintaining public security, but such is not the effect of the legislation referred to: *Presser v. Illinois*, S. C. U. S., Oct. Term 1885.

The right to associate as a military company and parade with arms, not having been specially granted by an act of congress or law of the

state, is not an attribute of national citizenship protected by the 14th Amendment to the National Constitution : *Id.*

It is necessary to public peace, safety and good order, that state governments, unless restrained by their own constitutions, should have the power to control and regulate the organization, drilling and parading of military bodies, other than those authorized by the militia laws of the United States : *Id.*

Action in one State upon Judgment obtained in another—Suit against Joint Defendants—Evidence—Pleading—Where by the law of the state in which a judgment has been obtained in a suit against joint defendants, one of whom only was served with a summons, the judgment is valid against the defendant so served, an action can be maintained thereon against him in the courts of another state : *Harley v. Donoghue*, S. C. U. S., Oct. Term 1885. See also *Renaud v. Abbott*, *Id.*

Whenever it becomes necessary for a court of one state, in order to give full faith and credit to a judgment rendered in another state, to ascertain the effect which it has in that state the law of that state must be proved, like any other matter of fact ; and consequently an allegation in the declaration in the suit in the court of the second state, of the effect which such a judgment has by law in the state in which it was rendered is admitted by demurrer : *Id.*

Law Impairing the Obligation of a Contract—Public Officer—Compensation for Services.—When a public officer has rendered services under a law, resolution or ordinance which fixes the rate of compensation there arises an implied contract to pay for those services at that rate ; and a constitutional provision, passed after the services have been rendered, lowering the limit of taxation under the law which was in force while the services were performed, impairs the obligation of this contract by destroying the remedy *pro tanto* : *Fisk v. Jefferson Police Jury*, S. C. U. S., Oct. Term 1885.

Taxes for Benefit of Private Individuals—Bond issued to aid Individuals in Private Enterprises.—A large portion of the city of Charleston having been laid waste by fire, the legislature authorized the city council to issue its bonds and lend them to persons who desired to rebuild in the burnt district. Bonds of said city, called "Fire Loan Bonds," were accordingly issued and lent after the year 1868, and put upon the market. *Held*, that these bonds were not valid obligations of the city : *Feldman v. City Council of Charleston*, 23 S. C.

The legislature has no power to levy taxes for the purpose of assisting private individuals in carrying out private enterprises, even though incidental advantages may result to the public : *Id.*

Where bonds were issued by a city to be lent "to such applicants as will build up and rebuild the waste places and burnt districts of said city, or erect improvements upon their lots," *Held*, that the bonds so issued and lent were for private purposes, notwithstanding advantages might incidentally accrue to the city : *Id.*

This case distinguished from cases sustaining local taxation in aid of railroads ; and also from the case of *Herndon v. Moore*, 18 S. C. 339 : *Id.*

COSTS.

Suit against Aldermen—Personal Liability.—Where a board of aldermen have increased, and are continuing to increase, the debt of their city beyond the limit fixed by statute, and citizens institute an action to enjoin any further increase, the aldermen may be required personally to pay the costs of the action: *Scott v. Alexander*, 23 S. C.

CRIMINAL LAW.

Extradition—Who is a Fugitive from Justice.—To be a fugitive from justice, in the sense of the act of Congress regulating extradition, it is not necessary that the party charged should have left the state in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that, having, within a state, committed that which, by its laws, constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offence, he has left its jurisdiction and is found within the territory of another: *Roberts v. Reilly*, S. C. U. S., Oct. Term 1885.

Penal Statute—Definition of Crime—Uncertainty.—The statute making it a misdemeanor to "commit any act injurious to the public health or public morals, or the perversion or obstruction of public justice, or the due administration of the law," is unconstitutional and void for uncertainty: *Ex parte Jackson*, 45 Ark.

Accomplice—Evidence—Acts and Declarations.—Before the acts and declarations of a felon can be put in evidence against an alleged accomplice, it must be proved to the satisfaction of the trial judge that the two had conspired together to commit the offence charged: *Rowland v. State*, 45 Ark.

The acts and declarations of one accomplice, in the absence of another, after the deed is done and the criminal enterprise is ended, are not admissible in evidence against the latter: *Id.*

DEBTOR AND CREDITOR.

Voluntary Conveyance—Purchase of Judgment with Notice.—A., being then indebted, made three voluntary conveyances of his land, and afterwards judgments were obtained against him on this antecedent indebtedness. B., with notice of these prior deeds, advanced a sum sufficient to pay off these judgments, which were then assigned to him; and as further security, A. gave to B. a bond with a higher rate of interest, and a mortgage of the land embraced in the said voluntary conveyances. In action by B. against A. and these grantees to foreclose such mortgage, *held*, that the deeds were not a fraud upon any rights which B. was here seeking to enforce; and, therefore, whether A. owed any other debts at the time he made the conveyances, was irrelevant in this action: *Carrigan v. Byrd*, 23 S. C.

DECEDENTS' ESTATES.

Failure to present Claim—Promise of Executor—Estoppel.—Executors' verbal statements to a creditor of the estate, that his claim was all right, and that they would pay it as soon as they had enough money on
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hand to do so, will not excuse such creditor's neglect to present the claim to them formally within the time limited by the order of the court, nor estop them from setting up the order; nor will an allegation that they have wasted the estate, unsupported by a statement of the facts constituting such waste, render them personally liable to a creditor of the estate: *Lewis v. Champion*, 40 N. J. Eq.

Preference—Debts due to Public—Surety.—A debt due by a surety at the time of his death on a county treasurer's bond, for default of his principal, is a "debt due to the public," and as such is entitled to priority of payment out of the assets of one deceased: *Baxter v. Baxter*, 23 S. C.

DEED.

Acknowledgment—Impeachment of.—The maker of a deed may prove that there was no appearance before an officer to acknowledge it, and no acknowledgment in fact, but if he did acknowledge it in some manner, the officer's certificate is conclusive of the terms of acknowledgment: *Petty v. Grisard*, 45 Ark.

EASEMENT. See *License*.

EQUITY.

Agreement by Director to indemnify Co-Director—Statute of Frauds—Remedy at Law.—The complainant, one of the eight directors of a corporation, endorsed a promissory note for its benefit, and the proceeds of which it received, under an oral agreement with all of his co-directors to indemnify him from all loss resulting therefrom, except as to his own portion, one-eighth. He was compelled to pay the note, and five of the directors repaid him their respective shares of the amount. On demurrer by the other two directors to a bill to recover the amount due on their indemnity, *Held*, 1. That the agreement was not within the Statute of Frauds. 2. That the remedy at law being adequate, the bill must be dismissed: *Cortelyou v. Hoagland*, 40 N. J. Eq.

Subrogation—Reformation—Assignee of Void Security.—The assignee of a void security, issued in lieu of a valid one, is in equity, subrogated to all the rights of his assignor (the holder) in the original security; and is entitled to have it delivered up to him, and if imperfect, to have it reformed by the party that executed it, or by his successor in office: *Goldsmith v. Stewart*, 45 Ark.

The plaintiff filed his complaint in equity against the clerk of the county and several separate boards of school directors, showing that the holders of school warrants of their several school districts, had presented them to the county court for cancellation and re-issue, in pursuance of an act of the legislature, and that new warrants were issued by the court and were transferred to him by the holders, and the originals were deposited with the clerk; and that the act under which the new issue was made had been declared unconstitutional and void by this court. Further that the original warrants were imperfect in omitting to state the considerations for which they were issued. He prayed that they be delivered up to him by the clerk and be reformed by the directors of the districts for which they had been issued by their predecessors. *Held*,

upon demurrer : 1st. That the plaintiff, as assignee of the void re-issue, was in equity subrogated to all rights of the holders in the original certificates, and was entitled to them. 2d. The trustees who issued the originals should be parties, and should reform them, if within reach of the process of the court, but if not, then their successors, the defendants, might reform or re-issue them under the directions of the court : *Id.*

EVIDENCE. See *Criminal Law*.

EXECUTORS AND ADMINISTRATORS. See *Decedents' Estates*.

EXTRADITION. See *Criminal Law*.

FRAUDS, STATUTE OF. See *Equity*.

Promise to pay Debt of Another—Agreement to accept Draft—New Consideration.—An agreement by a third party, to accept for creditor his debtor's draft for the amount of his debt, stands upon the same footing as a promise to pay the debt, and must, under the Statute of Frauds, be in writing, if a promise to pay the debt should be : *Chapline v. Atkinson*, 45 Ark.

A parol promise to pay the debt of another is not within the Statute of Frauds when it arises from some new and original consideration of benefit or harm moving between the newly contracting parties : *Id.*

HIGHWAYS. See *Streets*.

INNKEEPER.

Deposit of Money by one not a Guest—Liability.—An innkeeper is not liable as such for the loss of money deposited with him for safe keeping by a person who is not a guest of the inn at the time such deposit is made, or at the time the loss occurs : *Arcade Hotel v. Wiatt*, 44 Ohio St.

The clerk of such innkeeper has no authority to bind the latter, either as innkeeper or special bailee, for the loss of money deposited for safe keeping with such clerk by a person who is not a guest of the inn at the time of such deposit : *Id.*

W., the keeper of a gambling house closed his night's business at 2 o'clock A. M., having a sum of money upon his person ; and not being ready to retire for the night, and not wishing to carry his money upon his person at that time of the night, visited an inn for the purpose of depositing his money for safe keeping ; found the inn in charge of a night clerk ; inquired if he could have lodgings for the night ; was told that he could ; stated that he did not desire to go to his room at that time, but wished to leave some money with the clerk, and would return in about half an hour. The clerk told him he would reserve a good room for him. He did not enter his name. It was not upon any book of the inn. No room was assigned to him. He left his package of money with the clerk, received a check for it, and departed. He returned in about three hours to have a room assigned him and retire for the balance of the morning. The clerk had absconded with the money. *Held*, W. was not a guest of the inn at the time he deposited his money with the clerk, and the innkeeper is not liable for its loss : *Id.*

INSURANCE.

Representations — Warranty — Forfeiture — Premium.—When a life policy is issued and accepted upon the express condition that the answers and statements of the application are warranted true in all respects, and that if the policy be obtained by any untrue answer or statement, or by any fraud, misrepresentation or concealment, "the policy shall be absolutely null and void;" and, as to matters material to the risk, some of the answers and statements are untrue in fact, though made without actual fraud and under an innocent misapprehension of the purport of the questions and answers; no contract of insurance is thereby made, and the policy does not attach but it is void *ab initio*: *Conn. Mut. Life Ins. Co. v. Pyle*, 44 Ohio St.

When, for such a policy, premium has been paid by the applicant to the insurance company, such payment may be recovered back: *Id.*

JUDGMENT. See *Constitutional Law*.

JUDICIAL SALE.

Purchaser under Sale subsequently set aside—Liability of—Insurance.—Where parties take possession of property, purchased by them at a sheriff's sale, under circumstances that induced a Court of Equity from considerations of public policy, to set the sale aside, the sale cannot be said to have been void, and the purchasers *tortfeasors*, nor can they be regarded like to trespassers taking possession *vi et armis*, but their relation to the execution debtor is like to that of trustee to *cestui que trust*: *Bath South Carolina Paper Co. v. Langley*, 23 S. C.

Where a *quasi* trustee has insured property of his *cestui que trust*, for which, being burned, he receives the insurance money, he is accountable for the amount so received, less his payments in effecting and collecting the insurance: *Id.*

LICENSE.

When Irrevocable — Contract with Railroad Company.—Where a license is a power coupled with an interest of a permanent character, it is irrevocable; and if the interest be an interest in land, and the contract be by parol only, the Court of Equity will hold the contract binding, where the licensee has incurred trouble and expense in carrying out such contract: *Meetze v. Railroad Co.*, 23 S. C.

Thus, where a railroad company, for certain privileges, was permitted by parol to construct upon the plaintiff's land a dam, a canal, and a water-wheel, for the purpose of keeping its tank supplied with water, the license was irrevocable and might be enforced in equity notwithstanding the Statute of Frauds: *Id.*

And this special contract being valid and therefore of force, the plaintiff, upon the withdrawal by the railroad company of such privileges, could not bring action for the value of the use and occupation of the land, but only for damages for breach of the special contract: *Id.*

LIMITATIONS, STATUTE OF.

Demurrer—Liability created by Statute.—Where the petition on its face shows a cause of action which is barred by the Statute of Limitations, no legal cause of action is stated, and a demurrer thereto, on the

ground that the petition does not state facts sufficient to constitute a cause of action, raises the question of the Statute of Limitations as well as other defects in the petition, though the better practice undoubtedly is, to specifically state in the demurrer that the cause of action is barred: *Seymour v. P. C. & St. L. R. Co.*, 44 Ohio St.

An action against a railroad company to recover damages for killing or injuring a domestic animal which had strayed upon its track, and was killed or injured without fault or negligence of the railroad company in operating its train, but solely by the neglect to fence the road as required by law, is founded upon "a liability created by statute, other than a forfeiture or penalty," and is barred in six years: *Id.*

MASTER AND SERVANT.

Relation existing between Hack Driver and Hirer—Negligence.—The plaintiff while being driven in a hired hack was injured by its collision with a railroad train, the accident being due to the concurrent negligence of the hackman and the engineer, and sued the railroad company. *Held*, that the court below was right in leaving it to the jury to say whether the plaintiff had exercised any control over the conduct of the driver further than to indicate the places to which he wished him to drive, and instructing them that, unless he did exercise such control, and required the driver to cross the track at the time the injury occurred, the negligence of the driver was not imputable to him so far as to bar his right of action against the defendant: *Little v. Hackett*, S. C. U. S., Oct. Term 1885.

MUNICIPAL CORPORATION.

Liability of New Corporation succeeding to Old.—Where the legislature of a state has given a local community, living within designated boundaries, a municipal organization, and a subsequent act, or series of acts, repeals its charter and dissolves the corporation, and incorporates substantially the same people as a municipal body under a new name, for the same general purpose, and the great mass of the taxable property of the old corporation is included within the limits of the new, and the property of the old corporation used for public purposes is transferred, without consideration, to the new corporation for the same public uses, the latter, notwithstanding a great reduction of its corporate limits, is the successor, in law, of the former, and liable for its debts; and if any part of the creditors of the old corporation are left without provision for the payment of their claims, they can enforce satisfaction out of the new: *Mobile v. Watson*, S. C. U. S., Oct. Term 1885.

NEGLIGENCE.

Proximate Cause—Fire.—Where fire is negligently thrown from a mill smoke-stack and carried to a building outside the mill property, and thence to another building of a third party, and thence to other property that is damaged by the fire; whether such negligence is the proximate cause of such damage, is a question of fact for the determination of the jury under the instructions of the court: *Adams v. Young*, 44 Ohio St.

In an action against a mill owner for damages to property caused by fire negligently or carelessly thrown by sparks from the smoke-stack of

the mill and carried to the property by a gale of wind blowing at the time in the direction of the property, by which fire the same was damaged; where the conditions continue the same as when the negligent and careless act was done, and no new cause intervenes, it is no defence that the fire first burned an intervening building and was thence communicated by sparks and cinders in the same manner to the building in which such fire consumed the property; though the buildings were separated by a space of two hundred feet: *Id.*

NOTICE.

Possession.—Without proof of notice, either actual or constructive, an unregistered title is void, and of no effect against a subsequent judgment creditor of its grantor: *Executors of Hodge v. Amerman*, 40 N. J. Eq.

The burden of proving notice in such a case rests on the holder of the unregistered title: *Id.*

Constructive notice of an unregistered title is just as effectual as actual notice: *Id.*

Possession, if open, notorious, exclusive and unequivocal, will constitute notice, and such possession may exist without actual residence on the land: *Id.*

It is not necessary, in order to prove notice, to show that the person to be effected by the notice knew of the possession of the other. If the possession of the other is of such a character as to constitute notice, then notice is a legal deduction from the fact of possession: *Id.*

PARTNERSHIP.

Account as to Funds resulting from Illegal Transaction.—Where one partner was township treasurer and with the knowledge of his co-partner deposited the township funds in the bank to the firm credit, *Held*, that this was a conversion of the public moneys; that both partners were *particeps criminis*, and that as to such funds the law will aid neither party against the other, either in the way of account, contribution or otherwise: *Davis v. Gelhaus*, 44 Ohio St.

PROHIBITION.

When a Defendant is entitled to a Writ of, as a Matter of Right—A Common-Law Writ.—Where an inferior court has clearly no jurisdiction of a suit or prosecution instituted before it, and the defendant therein has objected to its jurisdiction at the outset, and has no other remedy, he is entitled to a writ of prohibition as a matter of right; and a refusal to grant it, where all the proceedings appear of record may be reviewed on error: *Smith v. Whitney*, S. C. U. S., Oct. Term 1885.

It seems, that a writ of prohibition issues from the law side of a court which has both common-law and equity powers: *Id.*

SALE.

Rescission—Fraud of Purchaser—Ratification.—If a vendor of goods after being advised of the fraud of the purchaser in obtaining credit by misrepresenting his ability to pay, accepts further security instead of demanding a rescission of the contract and a return of the goods, he thereby ratifies the contract and cannot afterwards demand a rescission: *Bridgeford v. Adams*, 45 Ark.

One who claims to rescind a contract of sale must proceed with reasonable diligence to make such inquiries in reasonable time, as would be prompted by reasonable caution in business transactions: *Id.*

STREETS.

Dedication—Use of—Injunction.—A bill for injunction filed by the owners of a large tract of land, stated that they had laid it out into building lots, and had opened and dedicated streets thereon (which, however, had never been accepted by the public authorities), and had filed a map thereof in the county clerk's office; that complainants had sold some of the lots, and that the present owners thereof had an admitted easement in the adjacent streets; and that complainants annually expended large sums of money for repairing all the streets, and keeping them in order. *Held*, that complainants could not enjoin defendants, who are hackmen, from ordinarily using any of the streets, in carrying passengers to and from the railroad station in their vehicles for hire; *Point Pleasant Land Co. v. Cranmer*, 40 N. J. Eq.

UNITED STATES COURTS.

Suits for Penalties and Forfeitures—Exclusive Jurisdiction of the District Courts.—The 1st section of act of Congress of March 3d 1875, conferring jurisdiction upon the Circuit Courts of the United States "of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the constitution or laws of the United States," "or in which the United States are plaintiffs or petitioners," &c., does not take away the exclusive jurisdiction, conferred on the District Courts by the 9th section of the act of September 24th 1879, of all suits for penalties and forfeitures under the customs laws of the United States: *United States v. Mooney*, S. C. U. S., Oct. Term 1885.

LIST OF THE PRINCIPAL NEW LAW BOOKS.

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SEDGWICK—TAIT.—A Treatise on the Trial of Title to Land, including Ejectment, Trespass to try Title, Writs of Entry, and Statutory Remedies for the recovery of Real Property: Embracing Legal and Equitable Titles and Defences. By A. G. SEDGWICK and F. S. TAIT. 2d ed., Revised and Enlarged. 8vo., pp. 884. New York: Baker, Voorhis & Co.

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INVESTMENT OF TRUST FUNDS.

THE LAW IN ENGLAND.—The strictness of the English law upon the question is well known. Lord COTTENHAM thus states the rule: "It will be found to be the result of all the best authorities upon the subject, that although a personal representative, acting strictly within the line of his duty, and exercising reasonable care and diligence, will not be responsible for the failure or depreciation of the fund in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it; yet, if that line of duty be not strictly pursued, and any part of the property be invested by such personal representative, in funds or securities, not authorized, or be put within the control of persons who ought not to be entrusted with it, and a loss be thereby eventually sustained, such personal representative will be liable to make it good, however unexpected the result, however little likely to arise from the course adopted, and however free such course may have been from any improper motive:" *Clough v. Bond*, 3 Mylne & Craig 490. Similar comments have been made by other English judges: "No rule is better established than that a trustee cannot lend on mere personal security, and it ought to be rung in the ears of every one who acted in the character of trustee." Lord KENYON in *Holmes v. Dring*, 2 Cox 1: "The court will always discourage lending trust moneys on private security, though large interest may be given. It becomes a species of gambling." Lord Commissioner NOTHAM, *Adye v. Feuilletau*, 1 Cox 24; s. c. 3 Swanst. 84. The course of decision which has led up to this conclusion in England, is worthy of note. In *Trafford v. Boehm*, 3

Atk. 444, as early as 1746, Lord HARDWICKE decided that investing the trust funds in South Sea stock would not protect the trustee against personal liability for the loss; and the Lord Chancellor remarked that "Neither South Sea stock nor bank stock is considered a good security, because it depends on the management of the governors and directors, and is subject to losses." And in the same case he held that an investment "in South Sea or bank annuities, where the directors have nothing to do with the principal, and were only to pay the dividends and interest, until such time as the government pay off the capital, would be good security." In *Hancom v. Allen*, 2 Dickens 498, it was held in 1774, that if a trustee lay out trust money in a fund which the court does not adopt, and such fund afterwards sink in value, the court, though there was no *mala fides*, will throw the loss upon the trustee. Otherwise, if laid out in the fund which the court adopts: *Peat v. Crane*, 2 Dickens 498, note. In *Adye v. Feuilleteau*, 1 Cox 24; s. c. 3 Swanst. 84, decided in 1783, Lord LOUGHBOROUGH held that where an executor lends money of his testator, upon bond, he shall be personally answerable if the security prove defective, though the testator was in the habit of lending money on such security. Counsel attempted in this case to rely upon *Harden v. Parsons*, 1 Eden's Cas. 145, but that case was overruled by Lord ELDON in *Walker v. Symonds*, 3 Swanst. 62, and has never since been relied upon as an authority. In *Holmes v. Dring*, 2 Cox 1, decided in 1787, the executors had loaned the trust money of an infant on a bond with security. The obligors were in "ample circumstances" when the money was lent, but afterward became insolvent. The Master of the Rolls said that "it was never heard that a trustee could lend an infant's money on private security," and directed the executors to pay the money, and interest and costs. In *Wilkes v. Steward*, Cooper's Ch. Rep. 6, decided in 1801, the executors were empowered to lay out the legacy in the funds, "or in such other good security as they could procure and think safe." It was none the less held, that they could not lend it on personal security. In *Powell v. Evans* (1801), it was held that executors who neglected to call in money lent by the testator on a bond, should be charged with the loss that might be sustained by the subsequent failure of the obligors.

In *Ackerman v. Emott*, 4 Barb. (N. Y.) 636, it is said to be the well-settled rule of the English Court of Chancery, that the trustee

can only protect himself against risk, by investing the trust fund in real or government securities. He must either take security on real estate, or invest in a fund approved by the court; and no other fund is there approved by the court, except the public funds: *Vigrass v. Binfield*, 3 Mad. 62; *Walker v. Symonds*, 3 Swanst. 1; *Howe v. Earl of Dartmouth*, 7 Ves. 150; *Holland v. Hughes*, 16 Id. 111; *Tebbs v. Carpenter*, 1 Madd. 290; *Clough v. Bond*, 3 Mylne & Craig 490; *Darke v. Martyn*, 1 Beav. 525; *Keble v. Thompson*, 3 Cro. Ch. 112; *Wilkes v. Steward*, George Coop. 6; *Pocock v. Reddington*. 5 Ves. 799; *Collis v. Collis*, 2 Sim. 365; *Blackwood v. Borrowes*, 2 Conn. & Laws 477; *Watts v. Girdlestone*, 6 Beav. 188; *Geaves v. Strahan*, 8 DeG., M. & G. 291; *Fowler v. Reynal*, 3 Mac. & G. 500.

Whether or not this was at any time a perfectly accurate statement of the English law governing the investment of trust funds, it is certain that later statutes and decisions have made important and significant changes. By Lord St. Leonards' Act, 22 & 23 Vict. c. 65, sect. 32, trustees, executors and administrators, where not expressly forbidden by the instrument creating the trust, are authorized to invest trust funds in the stock of the Bank of England, or Ireland, or in East India stock; but the act does not apply where a particular fund is settled specifically, and there is no power of varying securities. By 23 & 24 Vict. c. 38, sect. 12, the original act was made retrospective, and the Court of Chancery was authorized to issue general orders pointing out certain securities which met with the court's approval. In pursuance of the authority thus granted a general order was issued in 1861 and modified in 1883 as follows: "Cash under the control of, or subject to the order of, the court may be invested in Bank stock, East India stock, Exchequer bills, and 2*l.* 10*s.* per cent. annuities, and upon mortgage of freehold and copyhold estates, respectively in England and Wales, as well as on consolidated, reduced and new 3*l.* per cent. annuities." By the combined operation of sects. 21 and 32, of the Settled Land Act 1882, all moneys in court which are liable to be laid out in the purchase of land to be made subject to a settlement may be "invested in government securities, or on other securities on which the trustees of the settlement, are by the settlement or by law authorized to invest trust money of the settlement, or on the security of the bonds, mortgages, or debentures, or in the purchase of the debenture stock of any railway company in Great Britain or

Ireland, incorporated by special Act of Parliament, and having for ten years next before the date of investment, paid a dividend on its ordinary stock or shares." It is said in *Brown v. Brown*, 4 K. & J. 704, that "in order to come within the description 'government or parliamentary stock or funds,' a fund ought to be either managed by Parliament, or paid out of the resources of the British Government, or at least guaranteed by that government." It is enacted by 30 & 31 Vict. c. 132, sect. 2, that "it shall be lawful for any trustee, executor, or administrator to invest any trust fund in his possession or under his control in any securities, the interest of which is or shall be guaranteed by Parliament." By 34 & 35 Vict. c. 47, sect. 13, a trustee, executor or other person empowered to invest money in public stocks or funds, or other government securities, may, unless forbidden by the will or other instrument under which he acts, whether prior in date to the act or not, invest the same in consolidated stock created by the Metropolitan Board of Works.

Prior to these statutes, while the question was in some doubt, loans upon mortgages were not permitted, or were certainly not encouraged: *Ex parte Cathorpe*, 1 Cox 182; *Ex parte Ellice*, Jacob 234; *Norbury v. Norbury*, 4 Mad. 191; *Widdowson v. Duck*, 2 Mer. 494; *Ex parte Fust*, 1 C. P. Cooper, T. Cott. 157, note (e); *Ex parte Franklin*, 1 De G. & Sm. 531; *Barry v. Marriott*, 2 Id. 491; *Ex parte Johnson*, 1 Moll. 128; *Ex parte Ridgway*, 1 Hag. 309; Lewin on Trusts (8th ed.) 312; Perry on Trusts, § 457. But see *Brown v. Litton*, 1 P. Wms. 141; *Lyse v. Kingdon*, 1 Coll. 188; *Knight v. Plymouth*, 1 Dick. 126; *Bocock v. Reddington*, 5 Ves. 800. Justification was found for this rule in *Barry v. Marriott*, 2 De G. & Sm. 491, as follows: That even where an express power existed to lend on real security, the court would refuse to exercise it by sanctioning a loan on mortgage, on the ground that in ninety-nine cases out of a hundred, the expense of the mortgage more than counterbalanced the increase of income. Now, however, by Lord St. Leonards' Act, "when a trustee, executor or administrator shall not by some instrument creating his trust be expressly forbidden to invest any trust fund in real securities in any part of the United Kingdom," he is at liberty to make such investment, provided it be in other respects reasonable and proper: Lewin on Trusts (8th ed.) 313; Perry on Trusts, § 457.

In spite of the care exercised by the English courts to protect the interests of the ward, that purpose is not permitted to do injus-

tice to the trustee. In *Knight v. Plymouth*, 1 Dick. 120; s. c. 3 Atk. 480, Lord HARDWICKE observed: "Suppose a trustee, having in his hands a considerable sum of money, places it out in the funds, which afterwards sink in their value, or on a security at the time apparently good, which afterwards turns out not to be so, for the benefit of the *cestui que trust*, was there ever an instance of the trustees being made to answer the actual sum so placed out? I answer, No! If there is no *mala fides*, nothing wilful in the conduct of the trustee, the court will always favor him; for, as a trust is an office necessary in the concerns between man and man, and which, if faithfully discharged, is attended with no small degree of trouble and anxiety, it is an act of great kindness in any one to accept it. To add hazard or risk to that trouble, and subject a trustee to losses which he could not foresee, and consequently not prevent, would be a manifest hardship, and would be deterring every one from accepting so necessary an office." The point decided in this case was that a receiver who paid the amounts of rents of an estate in his charge to a Bristol tradesman of good credit, taking his bills therefor on London, was not responsible for the loss of the money by his becoming bankrupt. In other words, that when trustees act by other hands, according to the usage of business, they are not answerable for losses. *Ex parte Belchier*, 1 Amb. 218; s. c. 1 Ken. 38. This decision has been affirmed in a very late case, where a trustee invested trust funds, and employed a broker to procure securities authorized by the trust, and paid the purchase-money to the broker, it was held that, if such was the usual and regular course of business of persons acting with reasonable care and prudence on their own account, the trustee was not liable for the loss of the money by fraud of the broker. Sir GEORGE JESSEL, M. R., Lord Justice BOWEN, and Lord BLACKBURN affirmed the general rule that a trustee is only bound to conduct the business of his trust in the same manner that an ordinarily prudent man of business would conduct his own; Lord BLACKBURN adding the qualification that "a trustee must not choose investments other than those which the terms of his trust permit." *Speight v. Gaunt*, 22 Ch. Div. 729; 9 App. Cas. 1; *Lamar v. Micou*, 112 U. S. 452.

PENNSYLVANIA.—The Pennsylvania statutes upon the subject are the following:

The Act of 1832 provides in substance that, wherever an executor, administrator, guardian or trustee has in his hands any money, the

principal or capital whereof is to remain for a time in his possession, under his control, and the interest, profits or income thereof is to be paid away, such trustee may present his petition to the Orphans' Court of the proper county, stating the circumstances of the case, and the amount or sum of money which he is desirous of investing : whereupon it shall be lawful for the court, upon hearing and due proof of the circumstances, to make an order directing the investment of the said money in the stock or debt of the United States, or in the debt of the Commonwealth of Pennsylvania, or in the debt of the city of Philadelphia, or in real security ; and in case the money be invested in conformity with such direction, the trustee shall be exempted from all liability for loss on the same, in like manner as if the investment had been made in conformity with a similar direction in the wills or other instruments creating the trust. *Provided*, that nothing contained in the act should authorize the court to make an order contrary to the direction contained in any will or other instrument in regard to the investment of such moneys.

By the Act 8th May 1876, the provisions of this act were extended so as to include all bonds or certificates of debt now or hereafter to be created and issued according to law by any of the counties, cities, school-districts or municipal corporations of this Commonwealth ; " which said bonds or certificates are hereby declared to be legal investments of moneys by executors, administrators, guardians or trustees."

By the Act 13th April 1854, it was declared lawful for any trustee, committee, guardian or other person acting in a fiduciary capacity, to invest trust moneys in ground-rents, or other real estate, by leave of the proper court, provided the court approved, and such investment made no change in the course of succession.

At one time, in the history of legislation in Pennsylvania, statutes authorizing investments in particular securities were quite common. Acts authorizing investments in the following securities were passed between the years 1851 and 1872 : Bonds of the county of Allegheny, the city of Pittsburgh, and the city of Allegheny ; bonds of the borough of Allentown ; loan of the county of Chester ; bonds of the Pennsylvania Railroad Company, secured by a certain mortgage ; public debt of the city of Williamsport ; mortgage bonds of Philadelphia and Reading Railroad Company, secured by a certain mortgage ; loan of the county of Adams.

Some of such legislation is now, however, a thing of the past.

Article III. sect. 22, of the Pennsylvania Constitution of 1874, provides as follows: "No act of the General Assembly shall authorize the investment of trust funds by executors, administrators, guardians or other trustees, in the bonds or stock of any *private* corporation, and such acts now existing are avoided, saving investments heretofore made."

The earlier Pennsylvania cases avoid passing upon the question as to whether, since the enactment of the statutes mentioned, a trustee, with general authority, would be justified in lending the trust fund on any other securities than those pointed out in the acts: *Nyce's Estate*, 5 W. & S. 254; *Morris v. Wallace*, 3 Penn. St. 319. See, also, *Pray's Appeal*, 34 Penn. St. 100. *Twaddell's Appeal*, 3 Penn. St. 319, is an interesting and well-considered case. There a guardian, under an ordinary power, invested in the loan of the Lehigh Navigation Company—a corporation owning coal lands and a canal—and the investment was sustained. Chief Justice GIBSON therein lays down some important and able views: The Act of 1832 was not passed for the purpose of restricting the investments of trustees to the securities therein pointed out, but to name a course free from risk. It would be inconvenient, burdensome and expensive to demand judicial sanction for every investment. The act was passed for the protection of the trustee. It is doubtful whether the English rule or any other unbending principle covers the necessities of the case. The investment in this case was not on personal security, but in the loans of a great and flourishing corporation, the value of whose landed capital, to say nothing of its works, vastly exceeded the amount of its debts. The income from its coal mines and its canal was appropriated to payment of interest on its loans in the first instance; and the investment was consequently made, in substance, though not in form, on real security. The investment in *Nyce's Appeal* was made in the stock of a bank; and the history of banking for thirty years shows that it was essentially a hazardous one. Had the money in the present case been invested in the stock of a company which cannot receive a dividend till the interest on its loans had been paid, or had its dividends then been suspended, the case might probably have presented a different aspect. See, also, *Rush's Estate*, 12 Penn. St. 375. In *Barton's Estate*, Pars. Select Eq. Cas. 24, in the Orphans' Court of Philadelphia, the trustees were invested with the "full and uncontrolled management of the said \$16,000, so that

the same might be invested in real or personal property, or in such other way as they may think best." Investments already made by the testatrix in stock of the Schuylkill Bank and in a loan of the Lehigh Navigation Company were retained and the trustee exonerated. In commenting upon the Act of 1832, KING, J., observes: "It was intended simply to indemnify any trustee having money in his hands, the principal of which was payable in future, and the income to be paid away or accumulated, if he invested such fund in one of certain designated securities under the direction of this court. It was not intended to divest him of any authority lawfully exercised under the terms of the instrument creating the trust. This is shown by the proviso of the act, which declares that "nothing contained in it should authorize the court to make an order contrary to the direction of any will or other instrument in regard to the investment of such moneys. It was intended specially to embrace a large class of cases in which no direction is given by the instrument creating the trust *how* the trust fund shall be invested; such as the general direction, so common in country wills, to 'put out money at interest.' This is also shown by the words of the law, in which it is said that a trustee so investing under the order of this court, 'shall be exempted from all liability for loss, in the same manner as if such investment had been made in pursuance of directions in the will or other instrument creating the trust.' The act was intended as a substitute for special directions as to investment in the trust instrument; not as a *supersedeas* of full and express authority given by a testator or grantor. It leaves trustees clothed with special powers in regard to the investment of trust funds as it found them, responsible only for defaults arising from acts inconsistent with the terms of their charter; acts done without due and proper caution, or in violation of good faith."

The drift of opinion, in Pennsylvania, while apparently conceding the correctness of this construction of the acts of assembly, is in a contrary direction. In *Worrell's Appeal*, 9 Penn. St. 508, there was an investment under a general power in the stock of a navigation company when in good credit, and paying large dividends, which it continued to do for some time. It was common for other trustees to invest in such stock, and for others to use it as a permanent and safe investment. The guardian had invested his own funds in the same manner. The stock continued to pay large dividends and to be in good credit for some years after

the investment, and some of the wards who received the stock on attaining their majority, had realized a large profit on the investment of their share of the fund. Nevertheless the guardian was held liable for a depreciation. The references to the decision in *Twaddell's Appeal* in this case are not flattering. The same case came up again before the Pennsylvania Supreme Court—*Worrell's Appeal*, 23 Penn. St. 44—and there the court uses this language: "It may now be considered as settled law that in Pennsylvania an investment by a guardian or other trustee, unless authorized by the deed of trust, in the stock of an incorporated company, whether a bank, railroad, canal, manufacturing or mining corporation, cannot be made at the risk of a ward or other *cestui que trust*." See, also, *Stanley's Appeal*, 8 Penn. St. 431; *Hemphill's Appeal*, 18 Id. 303. In *Pray's Appeal*, 34 Penn. St. 100, the power given the trustee authorized an investment "in any property, real or personal, that he may see fit," and the investment was made in the stock of a manufacturing company, the works of which were unfinished, and the stock not paid up in cash. The investment was held unauthorized. The court remarks: "It is not necessary in this case to decide whether, where a discretion is left, the trustee should always adhere to the securities pointed out by the act of assembly; but we must say that we think it the safest and wisest course. In our own books we have no such gross violation of the rules governing investments by trustees as the present; the nearest being that of the *Estate of Esther Barton*, 1 Pars. Eq. Cas. 24, decided by Judge KING in 1842. There, at the time of the investment, the stock and loans were valuable paying securities; and even this case is much shaken by the later decisions of *Hemphill's Appeal*, 18 Penn. St. 303, and *Worrell's Appeal*, 23 Id. 44, if not substantially overruled." In *Ihmsen's Appeal*, 43 Penn. St. 431, the direction was by will to invest the fund "in some good, secure and profitable stocks or other securities, and if they cannot be procured at reasonable prices, then to invest the said sum of \$15,000 in some other way, so that the same will be well secured." The investment chosen was in the stock of the Ohio and Pennsylvania Railroad Company. Although there was no fraud, and the trustee had invested his own property in the same stock, such an investment was held to be illegal; it should have been made in the stocks or securities prescribed by the acts of assembly. In *Pleasant's Appeal*, 77 Penn. St. 356, authority was given to invest "in some safe and

productive stock, mortgage or other real security, either in Jamaica or the United States of America." The investment was made in July 1836, in the stock of the Bank of the United States, and the court refused to surcharge the trustees.

See, generally, *McCahan's Appeal*, 7 Penn. St. 56; *Angue's Estate*, 2 Phila. 137; *Seidler's Estate*, 5 Id. 85; *Gaw's Estate*, 34 Leg. Int. 66; s. c. 24 Pitts. L. J. 128; *Shields's Estate*, 14 Phila. 307; *Jack's Appeal*, 94 Penn. St. 367; *Pleasanton's Appeal*, 99 Id. 362; *Eysters Appeal*, 16 Penn. St. 372.

It may be well to observe, however, that the latest statement of the measure of a trustee's duty by the Pennsylvania Supreme Court is as follows: "The measure of diligence and care required of a trustee is precisely that which a man of ordinary prudence would practise in the care of his own estate. This rule has been so often laid down in our books that it seems unnecessary to refer to authorities on that point, a reasonable degree of vigilance and the exercise of good faith is the standard of the trustee's duty:" *Fahnestock's Appeal*, 104 Penn. St. 46.

NEW YORK.—There seems to be little doubt, and even little difference of opinion, as to what is the law upon the subject in New York. As early as the case of *Smith v. Smith*, 4 Johns. Ch. 281, Chancellor KENT remarked that he had no doubt that it was a wise and excellent general rule, that a trustee loaning money must require adequate real security, or resort to the public funds, though he adds, that he was not prepared to say whether there are any, and if so, what exceptions to this rule. The case of *King v. King*, 3 Johns. Ch. 552, lends additional support to this view. A case of great interest and one containing an able and exhaustive opinion, is that of *Ackerman v. Emott*, 4 Barb. 626. After a most elaborate review of the authorities, both English and American, the court observes: "On the whole I cannot doubt but the English rule is adopted here, and that a trustee cannot be protected against a loss in investing trust funds, unless he loans on real security, or invests in some fund approved by the court. Such a rule is easily defined and readily understood, and I repeat, it is as necessary to the safety of the trustee, as to the protection of the *cestuis que trust*." Another case of importance, affirming this general doctrine, is that of *King v. Taftot*, 40 N. Y. 76. Therein the court remarks: "My own judgment, after an examination of the subject, and bearing in mind the nature of the office, its importance, and

the considerations which alone induce men of suitable experience, capacity and responsibility to accept its usually thankless burden, is, that the just and true rule is, that the trustee is bound to employ such diligence and such prudence in the care and management, as in general, prudent men of discretion and intelligence in such matters employ in their own like affairs." In the late case of *Mills v. Hoffman*, 26 Hun (N. Y.) 594 (1882), this statement of the rule is reiterated in the following words: "From our examination of the authorities and the cases referred to, we have come to the conclusion that as a general rule it is the duty of trustees to invest funds held by them, in government or state securities, or in bonds and mortgages, on unincumbered real estate; that while this rule is not arbitrary and inflexible, so as to admit of no possible exceptions, it is the basis upon which trustees should usually act; that in any event the trustee is bound to employ such diligence, care and prudence in the management of the trust, as diligent, careful, prudent men of discretion and intelligence generally employ in their own like affairs, and that for a neglect to make use of such diligence, care and prudence, the trustee becomes liable." See, also, *Adair v. Brimmer*, 74 N. Y. 539; *Clark v. St. Louis, Alton, &c., Rd.*, 58 How. Pr. (N. Y.) 21; *In re Foster*, 15 Hun (N. Y.) 387; *Baker v. Disbrow*, 3 Redf. (N. Y.) 348; *Bates v. Underhill*, Id. 365; *Judd v. Warner*, 2 Demarest (N. Y.) 104; *Ormiston v. Olcott*, 22 Hun 270; s. c. (on app.) 84 N. Y. 339; *Goodwin v. Howe*, 62 How. Pr. (N. Y.) 134.

NEW ENGLAND AND SOUTHERN STATES.—In forcible contrast to the decisions just cited from Pennsylvania and New York are those in New England and the South. In *Harvard College v. Amory*, 9 Pick. 446, the testator directed his trustees to lend the trust fund upon ample and sufficient security, "or to invest the same in safe and productive stock, either in the public funds, bank shares or other stock, according to their best judgment and discretion, hereby enjoining on them particular care and attention in the choice of funds, and in the punctual collection of the dividends, interest and profits thereof, and authorizing them to sell out, reinvest and change the said loans and stocks from time to time, as the safety and interest of said trust fund may, in their judgment require." After stating that the English rule had never been recognised in Massachusetts, the court sustains an investment in stocks of manufacturing corporations or incorporated insurance companies, and lays down

the following as the rule: "All that can be required of a trustee to invest is that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested." For half a century this has been the law of Massachusetts, and is still adhered to, and has been applied in cases where the terms of the trust contained no special provisions upon the subject: *Lovell v. Minot*, 20 Pick. 116; *Kinmonth v. Brigham*, 5 Allen 270; *Clark v. Garfield*, 8 Id. 427; *Brown v. French*, 125 Mass. 410; *Bowker v. Pierce*, 130 Id. 262.

In VERMONT and NEW HAMPSHIRE, investments honestly and prudently made, in securities of any kind that produce income, appear to be allowed; *Lamar v. Micou*, 112 N. S. 452; *Barney v. Parsons*, 54 Vt. 623; *Knowlton v. Bradley*, 17 N. H. 458; *Kimball v. Reding*, 31 Id. 352; *French v. Currier*, 47 Id. 88.

In MAINE the courts may, upon application, direct trustees as to the manner of investment, but no special investments are pointed out: *Knowlton v. Brady*, 17 N. H. 458; Perry on Trusts, sect. 459.

In MARYLAND good bank stock, as well as government securities and mortgages on real estate, has always been considered a proper investment: *Hammond v. Hammond*, 2 Bland 306; *Gray v. Lynch*, 8 Gill 403; *Murray v. Feinour*, 2 Md. Ch. 418; *Lamar v. Micou*, 112 N. S. 452.

In MISSISSIPPI investment in bank stock is allowed; *Smyth v. Burns*, 25 Miss. 422. But in *Coffin v. Bramlitt*, 42 Id. 194, it was held that a guardian assuming to invest or loan out the money of his ward without the authority of the Probate Court takes the risk, and in the event of loss, is liable.

In GEORGIA and ALABAMA the matter is regulated by statute. That of Georgia, passed in 1845, authorized executors, administrators, guardians and trustees, holding any trust funds, to invest them in securities of the state. In 1863 this statute was amended by adding a provision that any other investment of trust funds must be made under a judicial order, or else be at the risk of the trustees. The construction placed upon the first statute was that such investments were not compulsory upon trustees, and prior to the passage

of the amendment thereto, it was held that those who lent the fund at interest, on what was at the time considered to be good security, were not liable for a loss without their fault: *Cobb* Dig. 333; *Code* 1861, sect. 2308; *Brown v. Wright*, 39 Ga. 96; *Moses v. Moses*, 50 Id. 9. The Alabama statute of 1852 authorized guardians and trustees to invest on bond and mortgage, or on good personal security, with no other limit than fidelity and prudence might require: *Code* 1852, sect. 2024; *Code* 1867, sect. 2426; *Foscue v. Lyon*, 55 Ala. 440; *Lamar v. Micou*, 112 U. S. 452.

In NEW JERSEY a statute authorized an investment to be made upon an application to the court, but does not establish any particular funds: *Perry on Trusts*, sect. 459. But it is also laid down as a rule, that investments must be made in government stocks, or in real security: *Gray v. Fox*, Saxton 259; *Lathrop v. Smalley*, 23 N. J. Eq. 192.

In MICHIGAN and MISSOURI the courts may, upon application, direct trustees as to the manner of investment, but no special investments are pointed out: *Gauble v. Gibson*, 59 Mo. 585; *Perry on Trusts*, sect. 459.

Authorities upon the question involved are not numerous in the West and South. The following cases will be found to bear more or less, upon the matters under discussion: *Tucker v. State*, 72 Ind. 242; *Christy v. McBride*, 1 Scam. 75; *Field v. Colton*, 7 Brad. 379; *Williams v. Williams*, 55 Wis. 300; *Allen v. Graves*, 3 Bush (Ky.) 491; *Luzor v. Wilgus*, 7 Id. 206; *Dickinson v. Trout*, 8 Id. 442; *Clark v. Anderson*, 13 Id. 112; *Smith v. Lampton*, 8 Dana (Ky.) 73; *Wynne v. Warren*, 2 Heisk. (Tenn.) 476; *Collins v. Smith*, 1 Head (Tenn.) 251; *Thomas v. Scruggs*, 10 Yerger 400; *Coffin v. Bramlitt*, 42 Miss. 194; *Harrison v. Monk*, 10 Ala. 185; *Dejarnette v. Dejarnette*, 41 Id. 708; *Foscue v. Lyon*, 55 Id. 440; *Ex parte Calmes*, 1 Hill Ch. (So.C.) 112; *Rainsford v. Rainsford*, Rice's Eq. (So.C.) 343; *Boggs v. Adger*, 4 Rich. Eq. (So. C.) 408; *Barksdale v. Hall*, 13 Id. 180; *McClure v. Steele*, 14 Id. 105; *Snelling v. McCreary*, 14 Id. 291; *Nance v. Nance*, 1 So. C. 209; *Allen v. Gaillard*, 1 Id. 279; *Mayer v. Mordecai*, 1 Id. 383; *Womack v. Austin*, 1 Id. 421; *Sanders v. Rogers*, Id. 452; *Mathews v. Heyward*, 2 Id. 239; *Creighton v. Pringle*, 3 Id. 77; *Singleton v. Lowndes*, 9 Id. 465; *Davidson v. Moore*, 14 Id. 251.

It is very evident that there is no accepted rule of universal application. In England trustees are held to a stricter measure of liability as to investments than in any of the United States, although it is sometimes claimed that several of the latter have adopted the same principles. It is, perhaps, worthy of note that the English rule is said to have had its origin in the necessities of the government; that its purpose was less to secure the interests of the *cestuis que trustent* than to encourage investments in the public securities: *Brown v. Wright*, 39 Ga. 96; Story's Eq. 1269, 1275. This explanation, even if the correct one, may suggest a cause but does not alter the effect. The fact remains that there the investment of trust funds is hemmed in by very careful restrictions, judicial and statutory. By a long course of decision and by special statutes certain securities are pointed out to a trustee as those in which he may place his trust funds and be free from all risk of any personal liability. But should he go outside of these? All investments on mere personal security are very plainly interdicted, as are also, perhaps, those on real security not approved by the courts. Attention has been called to several cases which may be assumed to state the English law of to-day: *Knight v. Plymouth*, 1 Dick. 120; s. c. 3 Atk. 480; *Ex parte Belchier*, 1 Amb. 218; s. c. 1 Ken. 38; *Speight v. Gaunt*, 22 Ch. Div. 727; 9 App. Cas. 1. These cases, however liberal, do not go to the length of authorizing an investment outside of those approved. Practically the same test of what is the measure of care required in handling trust funds is applied in these decisions as in those in Pennsylvania, Massachusetts and New York. The English judges affirm the rule that a trustee is only bound to conduct the business of his trust in the same manner that an ordinarily prudent man of business would conduct his own. But it must be observed that this rule is applied after the investment has been made. Since there seems to be no positive prohibition in the English statutes of other investments, it need not necessarily follow that a trustee who goes outside of them *ipso facto* becomes liable for any loss. We have, however, in the cases cited, little to indicate that, in such case, a trustee might excuse himself by showing that he had conducted the business of investing his trust funds in the same manner that an ordinarily prudent man of business might do with his own property.

The striking similarity between the English statutory provisions and those of Pennsylvania, New Jersey and Georgia,

and perhaps some other states, cannot be overlooked. The construction placed upon the Act of 1832, in Pennsylvania, for example, will then be of interest as determining the meaning of such statutes. The cases previously cited construe it with some care. Its main purpose was the protection of trustees. While in several states investments in national, state or municipal loans or in real securities are encouraged and recommended, it does not appear that they are obligatory upon trustees—such statutes operate rather as cities of refuge for trustees who prefer or require their protection. Trustees need no longer be subjected to the harassing and often unjust claims of *cestuis que trustent* who, had the investment proved successful, would have gladly accepted the increase and shown a different spirit. In the words of Chief Justice GIBSON, "It would be inconvenient, burdensome and expensive to demand judicial sanction for every investment:" *Twaddell's Appeal*, 5 Penn. St. 15. This opinion is confirmed by the case of *Barton's Estate*, 1 Pars. Eq. Cas. 24, and while in several particulars these cases have been criticised, there has been no attempt to place a different construction upon the Act of 1832. It is, perhaps, possible to draw a distinction between these two decisions. In the first no particular point is made of the terms of the instrument creating the trust. In the second the court observes: "It was not intended to divest him of any authority lawfully exercised under the terms of the instrument creating the trust. This is shown by the proviso of the act which declares that 'nothing contained in it should authorize the court to make an order contrary to the direction of any will or other instrument in regard to the investment of such moneys.' It was intended specially to embrace a large class of cases in which no direction is given by the instrument creating the trust *how* the trust fund shall be invested." While the first opinion is evidently of broader scope, the second may possibly warrant the inference that unless special directions are given, investments should be made with or without the sanction of the Orphans' Court only in the securities named in the acts. Nor is it to be denied that certain expressions in subsequent cases and statutes tend rather to confirm than to deny this construction. Such a view must however, leave unprovided for a large number of cases in which the terms of the trust instrument clearly contemplate a wider choice for the trustee than the statutory securities, and yet no specific investments are pointed out. If this view of the Pennsylvania statute is

the correct one, and its terms are properly construed as certainly not mandatory, and probably not even directory, it follows that with the exception of certain insecurities which have been expressly frowned upon, there are many investments open to trustees outside of those specified; that where the trust instrument may fairly be construed to grant such authority, a trustee who exercises the diligence and care, and prudence of men of discretion and intelligence in their own like affairs in the investment, as well as the management of his trust funds, will only find in such statutes as that of 1832 a means of anticipating the protection which the court when called upon would subsequently extend.

The early New York case of *Ackerman v. Emott*, 4 Barb. 626, declared that the English rule was adopted there. The latest statement of the law in that state, it is true, contains nothing to the contrary, but it is not a complete affirmance of the English rule. In the case above cited, *Mills v. Hoffman*, 26 Hun (N. Y.) 594, after stating that, as "a general rule," investment should be made in authorized securities, the court continues: "That while this rule is not arbitrary and inflexible, so as to admit of no possible exceptions, it is the basis upon which trustees should usually act; that in any event the trustee is bound to employ such diligence, care and prudence in the management of the trust as diligent, careful, prudent men of discretion and intelligence generally employ in their own like affairs, and that for a neglect to make use of such diligence, care and prudence the trustee becomes liable." In Massachusetts the English rule is expressly repudiated, and yet the rule which has had the sanction of the courts of that state for half a century savors strongly of that quoted from New York: "All that can be required of a trustee to invest is that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested."

This phrase, then, repeated in different words by courts whose opinions are supposed to differ widely, is apparently the nearest approach to a general rule that the authorities contain and courts would accept. Like most others of the sort, however, occasions will constantly arise in which it is wholly valueless, except as an indication of the *animus* of the court. The application of it to given

facts will not determine, in many cases, whether or not a trustee's investment is open to criticism. What court could or would name the securities in which, and in which alone, diligent, careful and prudent men of discretion and intelligence might place their funds? What is the standard by which the diligence, care and prudence of discreet and intelligent business men are to be judged? It is not unlikely that in some localities courts may be authorized by statute to sanction investments of which they approve, although the act specifies no securities: *Coffin v. Bramlitt*, 42 Miss. 194. Or, such an impression might readily arise from a misconception of the statutes above cited and a supposed analogy to the English practice. In either case it may well be doubted whether a real advantage is thereby acquired. Neither a court nor a legislature can supply prudence, intelligence and judgment for trustees. Nor should their authorization affect the respective rights and responsibilities of *cestuis que trustent* and trustees. The approval of a court cannot make a bad investment good or a good investment better. So far as such statutes merely afford protection to trustees their wisdom will not be questioned. It is clear, however, that this object is fully accomplished when certain public and real securities, undoubtedly the safest and therefore the least remunerative investments, are named. A step beyond this must fail of its purpose in unnecessarily restricting a trustee in the exercise of his judgment; in embarrassing a *cestui que trust* who wishes to call him to account, if not, in many cases, in wholly preventing such a proceeding; and in placing before the creator of a trust the alternative of specifying securities other than the statutory—although to-day they may be valuable and to-morrow they may be cast into the fire—or else of making his grant of power to the trustee so liberal as to be manifestly dangerous.

The intention of the creator of the ordinary trust is not a doubtful one. He is usually providing for those incapable of properly managing their own affairs, looking to the support and maintenance of those dependent upon him after his death. Promising speculations have at such a time no attraction. Unquestionably, whatever suggests severity in the law as applied to trustees results from the common acceptance of these facts. On the other hand, few positions of equal responsibility are as poorly remunerated as that of a trustee, and this whether regard be had to pecuniary or to personal and private considerations. Proper performance of the duties of

the office demands a combination of exceptional characteristics. If the possessor of such qualifications is to have his reputation and his estate endangered by stringent laws and captious beneficiaries the result must be a paucity of trustees. Another inevitable result of such a state of the law will be idle trust funds. Where lies the remedy? Certainly not in giving loose rein to trustees of a speculative turn of mind. Possibly not in shifting the responsibilities of trustees to the courts. But probably in giving to trust instruments that will permit of it a more liberal construction. In other words, the measure of capacity demanded of a trustee in the investment of trust funds should be an exercise of the diligence, care and prudence of men of discretion and intelligence in their own like affairs, and the measure of any further liability should be found only in the terms of the instrument creating the trust.

JNO. HOUSTON MERRILL.

Philadelphia, Pa.

RECENT AMERICAN DECISIONS.

Supreme Court of Wisconsin.

DE VOIN v. MICHIGAN LUMBER CO.

Where by a contract of hiring, the owner of a team sends his own servant to drive, he is only responsible for the acts of such driver in the handling of the team while being used in the stipulated employment, and where the team is lost while being used in a way, or at a place, or for a purpose not contemplated in the contract, the hirer cannot escape liability to the owner by showing that the driver consented to such use, or that the driver's negligence contributed to the loss.

A. hired his team and driver to B., to haul logs, and by the direction of C., B.'s foreman, the driver went to haul hay, and under the guidance of C., in going to a hay stack, drove over the snow-covered ice on the river, which broke through and the horses were drowned: *Held*, that B. was liable to A. for the value of the horses.

APPEAL from Circuit Court, Marathon County.

Plaintiff resided at Rhinelander and owned the span of horses in question, and had a hired man to drive them. Defendant hired the team and driver of plaintiff at a stipulated price per month. Defendant was engaged in lumbering at two different camps, Rocky Run and Sugar Camp. After being engaged some days in hauling supplies to Sugar Camp, defendant asked for permission to haul logs at Rocky Run, which was granted and the team and driver were accordingly sent there. After hauling logs there one day, defend-

ant's foreman directed the driver to haul some hay from a place on the river some ten miles distant, and sent a man along to show the way. In driving to the stack, the driver passed across water which had been frozen over, and covered with snow. The ice broke through and both horses were drowned. This action is to recover their value. Judgment was for plaintiff below, and defendant appeals.

L. A. Pradt and Neal Brown, for respondent, J. L. De Voin.

Grace & Craven, for appellant, Michigan Lumber Co.

The opinion of the court was delivered by

CASSODAY, J.—The court stated to the jury that it was admitted or proved by uncontradicted evidence, that at the time of the accident the team and driver “were in the employ of the defendant * * * for the purpose of hauling logs.” It is now claimed that this was a controverted question of fact for the jury to determine. The only witness of the defendant on that question testified, in effect, that he, in behalf of the defendant, made the contract of hire with the plaintiff; that he hired the team and driver “to haul logs, and to haul supplies to Sugar Camp or Rocky Run, just as he was a mind to have him.” It is undisputed that for the time being the team and driver had stopped hauling supplies, and had gone to Rocky Run for the express purpose of hauling logs, and had hauled logs there for one day. There is no claim nor any testimony to support any claim, of any express contract with the plaintiff, that the team should be used in hauling supplies from any other place than Rhinelander. The defendant did give evidence tending to prove that, by the general custom in the vicinity, it was understood that when a team was hired to haul logs, it included the right to use the same to haul a load of supplies, or a load of hay, or anything of that description. The court was very liberal in its allowance of evidence of such general custom. The plaintiff denied any knowledge of the existence of any such custom. The question whether such custom existed was fairly submitted to the jury. The verdict for the plaintiff negated the existence of such custom, and established the fact as a verity, that by the express contract of hire the team was only to be used in hauling supplies from Rhinelander, or logs at Rocky Run.

The defendant requested the court to instruct the jury, in effect, that the driver was the agent of the plaintiff: that his consent to

go for the hay, was the consent of the plaintiffs, and hence that he could not recover; and that if the injury occurred through the driver's negligence, then the plaintiff could not recover. For the refusal to give such several instructions, errors are assigned.

In a limited sense the driver was the agent of the plaintiff. He was such agent in caring for and driving the team, in hauling supplies from Rhinelander, and logs at Rocky Run. That included the proper feeding and handling of the team. He was only twenty-two years of age, but had some experience in driving teams. There is no claim nor evidence tending to prove that he was negligent in the act of handling the team. There was a road to the first stack. It had been cut by the guide sent with the driver. Near the first stack the road was along on the ice on the river. There was no difficulty in getting to the first stack. Between that stack and the other stack there was no road nor any broken path. It seems to have been, or at least a portion of it, right along on the river. But the water was frozen over, and the ice was covered with snow. The space between the two stacks appeared to be level snow, and there was no unusual appearance around or about the place where the accident occurred. The driver had never been there before. There is no evidence that there was any safer way, or any other way to the second stack. There is no evidence that the team was not driven properly, and in the way directed by the guide, who appears to have known of the *locus in quo*. The age of the guide is not given, but he was selected by the defendant's foreman for the purposes indicated. The accident did not occur by reason of any negligence in the mere driving or handling of the team, but in obeying the directions given by the foreman and guide, and driving the team into a dangerous place without knowing it to be dangerous. If the driver was negligent at all, it was in obeying directions and driving out upon the ice for the first time without first testing its strength. If the guide was negligent in walking behind the sled while being driven to the second stack, instead of going ahead of the team and testing the ice, yet, as the service in which they were then engaged, was not such as was contemplated in the contract of hire, he was not a co-employee with the driver in such a sense as to relieve the defendant from liability on account of such negligence: *Railroad Co. v. Fort*, 17 Wall. 553; *Mann v. Oriental P. W.*, 11 R. I. 152; *Lalor v. Chicago, B. & Q. Rd. Co.*, 52 Ill. 401.

Was the driver the agent of the plaintiff in the act of obeying

the directions of the defendant's foreman and guide, at a place distant from the camp, and in a kind of work not contemplated by the contract of hire? It seems to us that he was not. Of course, the driver was selected by the plaintiff to drive the team in performing the work contemplated in the contract of hire. Had the injury occurred by reason of any negligence or incompetency of the driver while engaged in the work or service so contemplated by the contract of hire, then the loss would have fallen upon the plaintiff; for, by selecting him to drive his team, he had taken upon himself the responsibility of the requisite care and competency of the person so selected in doing the work he had contracted to have him do: *Quarman v. Burnett*, 6 Mees. & W. 499; *Jones v. Mayor, &c.*, 14 Q. B. Div. 890; *Huff v. Ford*, 126 Mass. 24; *Joslin v. Grand Rapids I. Co.*, 50 Mich. 516. And yet, while engaged in such contemplated work, had the team been injured solely, by reason of having been driven by the careless direction of the defendant, into some place of danger, not obvious to the senses and unknown to the driver, there would be no question of the defendant's liability: *Indermauer v. Dames*, L. R., 2 C. P. 311. In such contemplated service the defendant was still under obligation to exercise reasonable diligence in providing a suitable place for the team to be driven; or in other words, not to carelessly cause the team to be driven into a place of concealed danger unknown to the driver: *Id.*; *Coombs v. New Bedford C. Co.*, 102 Mass. 583, 584; *Swoboda v. Ward*, 40 Mich. 423; *Parkhurst v. Johnson*, 50 Id. 70. In case of injury in such contemplated service, the mere fact that the driver was, in a limited sense, the agent of the plaintiff, as indicated, would not take away the liability of the defendant, under whose orders and control he was acting at the time, for negligently inducing him to drive into a place of concealed danger: *Rouke v. White M. C. Co.*, 2 C. P. Div. 205.

But the case at bar is more favorable for the plaintiff than any supposed. Here the injury occurred when neither the team nor the driver were engaged in the work contemplated in the contract of hire. They were both, however, doing service for the defendant under the directions of its foreman, and the guide selected by him. The team was drowned solely by reason of being driven by such direction into a place of concealed danger unknown to the driver. Had not the team at the time of the injury been accompanied and driven by the driver selected and employed by the plaintiff, there could be no

question but what such diverted use of the team would have been a conversion within all the authorities: *Wheelock v. Wheelwright*, 5 Mass. 104; *Homer v. Thwing*, 3 Pick. 492; *Hall v. Corcoran*, 107 Mass. 251; *Woodman v. Hubbard*, 25 N. H. 67; *Hart v. Skinner*, 16 Vt. 138. The same rule has been applied to the unauthorized use of slaves: *Horseley v. Branch*, 1 Humph. 199; *Scruggs v. Davis*, 5 Sneed 261; *Moseley v. Wilkinson*, 24 Ala. 411; *Fail v. McArthur*, 31 Id. 26; *Spencer v. Pilcher*, 8 Leigh 566. For the loss during such diversion or misuse, the defendant would have been absolutely liable, even though it occurred by reason of the fault of the horses or a mere accident: *Lucas v. Trumbull*, 15 Gray 306; *Perham v. Coney*, 117 Mass. 102; *Fisher v. Kyle*, 27 Mich. 454; *Lane v. Cameron*, 38 Wis. 603. Does the mere fact that the driver consented to the diversion of employment, and was in the act of driving the team when the accident occurred, relieve the defendant from the liability which would otherwise have existed? We must answer this question in the negative. There is no claim that he participated in, or was ever present at the time of making the contract of hire; nor that he had any authority to modify that contract or make a new one. The case is quite similar in principle to *Crocker v. Gullifer*, 44 Me. 491, where one of the drivers had a conditional interest in the horses and consented to the diversion; but it was held, the defendants were liable for their value, notwithstanding they were accidentally destroyed by fire without the neglect or fault of any one.

The judgment of the Circuit Court affirmed.

Bailments for hire embrace a variety of contracts growing out of the delivery of personal property on an agreement mutually beneficial to the contracting parties. The contract includes hire of things, hire of storage, hire of labor and services and hire of carriage: 2 Kent's Com. 586; Cowen's Trea. 66. But it will be necessary to confine this note to the hire of things.

Interest of the Bailee in thing hired.—It is an undisputed rule that the hirer of goods and chattels for use, acquires in them during the term of his contract, a possessory right. He purchases them for the purpose or time mentioned in the con-

tract, and during that time becomes the proprietor of them. In *Putnam v. Wyley*, 8 Johns. 432, the plaintiff let some cows and sheep for one year, to be returned at the end of that time with their natural increase; the court held the bailor could not maintain trespass against one taking goods from the possession of the bailee during the term of the contract, not having actual or constructive possession at the time. And the court further say, that to maintain trespass he should have such a right in the chattels as to be entitled to reduce them to possession at any time, but that the hirer had the possession of the chattels for a year. So, also,

upon the same principle the hirer may maintain an action, not only against third persons, but against the owner himself, if he interferes with the chattel before the bailment expires: *Hickok v. Buck*, 22 Vt. 149; *Wood v. Ash*, Owen 139; *Ham. N. P.* 249; *Roberts v. Wyatt*, 2 Taunt. 268.

The case of *Roberts v. Wyatt* arose out of the delivery of an abstract for the purpose of clearing up some portions of the title. Defendant refused to redeliver, and plaintiff brought trover, and the court held the plaintiff had a temporary interest in the abstract, which could not be determined until it was decided whether the sale should go on or not, and, therefore, he was entitled to the possession until such time. A creditor of the bailor has no right to take possession of the chattel during the term of bailment: *Hartford v. Jackson*, 11 N. H. 145. There the property was taken from the possession of the bailee by a creditor of the bailor. The latter sued the former for rent, and it was held the attachment by the bailor's creditor was no defence in an action for rent, but the court intimated the bailee might maintain an action against the officer who made the levy, or the attaching creditor himself, for any injury which might result from such seizure. Trover or replevin cannot be maintained by a bailor against one who converts property bailed; for, although he has a reversionary interest therein, he has neither the possession or right of possession: *Gordon v. Harper*, 7 T. R. 9; *Wheeler v. Train*, 3 Pick. 255.

It may be asked what rule may be applied to distinguish a bailment from an actual sale of the property? It is said in *Lonergan v. Stewart*, 55 Ill. 45, that where the thing delivered is to be restored, though in an altered form, the contract is one of bailment, and the title to the property is not changed; but where there is no obligation to return the specific article, and the chattel may be re-

stored by another of equal value, the title is changed, and it amounts to a sale. To same effect: *Story Bailm.* sect. 439; *Hurd v. West*, 7 Cow. 752; *Ewing v. French*, 1 Black. 353; *Chase v. Washburn*, 1 Ohio St. 244; *Norton v. Woodruff*, 2 Comst. 153; *Rahilly v. Wilson*, 3 Dill. 420; *Contra, Seymour v. Brown*, 19 Johns. 44. See as to a contract for sale or return: *Schlesinger v. Stratton*, 9 R. I. 578. Where, by a contract, a person receives a chattel to keep for a certain time, and to become the owner of it when he has paid the contract price, but if not, to pay for its use, it is a bailment and does not amount to a sale until the price is paid: *Enlow v. Klein*, 79 Penn. St. 488; *Rose v. Story*, 1 Id. 190; *Clark v. Jack*, 7 Watts 375. See *Becker v. Smith*, 59 Penn. St. 469; *Myers v. Harvey*, 2 P. & W. 479. The distinction between a bailment and a sale is well elucidated in *Hunt v. Wyman*, 100 Mass. 199, where the defendant expressed a wish to try the horse which plaintiff had for sale, and if he did not like it would return it "the night of the day when he got it." Plaintiff assented, and delivered the horse to defendant's servant, from whom it escaped, without his fault, and was so injured that defendant had no opportunity to try it, and, consequently, did not return it within the time agreed. Plaintiff sued for the price, and on the trial testified he did not expect defendant to take the horse until he had tried it. The court held this evidence showed a bailment but no sale. Says WELLS, J.: "An option to purchase if he liked is essentially different from an option to return a purchase if he should not like. In one case, the title will not pass until the option is determined; in the other, the property passes at once, subject to the right to rescind and return. A mere failure to return the horse within the time agreed may be a breach of contract, upon which the plaintiff is entitled to an appropriate remedy; but has no such legal effect as

to convert the bailment into a sale." See 6 Am. Law Rev. 450; *Bulkley v. Andrews*, 39 Conn. 70; *Moss v. Stone*, 5 Barb. 516; *Ledyard v. Hibbard*, 48 Mich. 421; *Powder Co. v. Burkhardt*, 97 U. S. 110; and *Carpenter v. Griffin*, 9 Paige Ct. 310, where the agreement was to return "cattle as good," at the end of the term, and it was held a sale. See also *Lewis v. McCabe*, 21 Am. Law Reg. N. S. 217, and note.

As to Bailee's use of the thing hired.—The lessor of a chattel is bound to furnish an article suitable for the purpose of the bailment, on the ground that the hirer must trust to the lessor's knowledge of the qualities of the chattel, like the purchaser under an implied warranty: Lord ABINGER, in *Sutton v. Temple*, 12 M. & W. 52; *Fowler v. Lock*, L. R., 7 C. P. 272. On the other hand, there is a corresponding implied obligation on the part of the hirer to use the chattel in a reasonable manner: *Robinson v. Varnell*, 16 Tex. 382; *Latimer v. Alexander*, 14 Ga. 260. The departure in an unreasonable way in the use of the chattel, brings down upon the bailee a strict liability to the bailor for all damages the latter has suffered; and in the case of *Wentworth v. McDuffie*, 48 N. H. 402, the court went so far as to say: "If the bailor had seen his mare was about to be destroyed by the bailee's wilful act, he would have been entitled to terminate the bailment, and retake his property if he could do it without force." The bailee, in that case, wilfully and intentionally drove the mare at such a violent rate of speed as to seriously endanger her life, he being aware of such danger. See *Story Bailm.*, sect. 396. The bailee also impliedly agrees not to apply the property bailed to any other use than for which it is hired. A familiar illustration of this rule is, if one hire a carriage and horses to go to Boston, he has no right to go upon a journey to New York; or, if he hire them for a week he has no right to use them for a month: *Story Bailm.*,

sect. 413; *Rotch v. Hawes*, *Homer v. Thwing*, *Wheelock v. Wheelwright*, cited in principal case.

The contract may specify the use to which the chattel is to be put, and under such circumstances, if the hirer use it in a way not authorized by the contract, he is guilty of conversion, and if a loss results, he is liable, independent of the question of negligence. He cannot excuse his failure to return it by showing it was lost while being used contrary to the terms of the contract: *Hooks v. Smith*, 18 Ala. 338; *Beach v. Raritan, &c., Rd. Co.*, 37 N. Y. 457. The case of *Beach v. Raritan, &c.*, was a case where a barge, while being used for a different purpose than that for which the parties had contracted, was sunk. It was held the bailee was liable. In *Hooks v. Smith*, a slave was bailed to do housework, and was put by bailee at work in the field, and while engaged in such work was drowned. Held, the loss must fall on bailee. Where the hiring is for a certain purpose, it is considered a part of the contract. The purpose for which a thing is hired may or may not enter into the contract. Where the contract of hiring is general, the bailee acquires the right to use the chattel generally, but not to employ it in any dangerous business: *Spencer v. Pilcher*, 8 Leigh 565. But in *Harvey v. Epes*, 12 Gratt. 176, it was held the incidental mention of a place where the thing is to be used, may not create an agreement on the bailee to use the chattel in such place, and that a use of slaves in a different place from that mentioned in the contract is not of itself a conversion, and that the burden of proof is on the hirer, to show that the loss did not result from the employment in a different place.

Such misuser is deemed a conversion of the property at common law, for which the bailee may be held to the full extent of the loss: *Story Bailm.*, sect. 413. But it seems that any misuse in the line of the use for which the thing is

bailed, will not amount to a conversion. Such a doctrine was indicated by REDFIELD, J., in *Swift v. Moseley*, 10 Vt. 208, where he says: "Any misuse or abuse of the thing bailed, in the particular use for which the bailment was made, will not enable the general owner to maintain trespass or trover against the bailee. His remedy is case. But if the thing be put to a different use from that for which it was bailed, by the consent of the bailee, we think the bailor may maintain trespass or trover." His remarks, however, are not applicable to the facts in that case. There the bailor brought trover for the property, claiming the bailee had sold it during the term of the bailment. MONCURE, J., in an exhaustive opinion in *Harvey v. Epes*, *supra*, is inclined to the opinion that unless the injury or loss results from the misuser, no action will lie. "The use," he says, "of the property by the hirer during the term, for a different purpose or in a different manner from that which was intended by the parties, will not amount to a conversion, for which trover will lie, unless the destruction of the property be thereby occasioned; or, at least, unless the act be done with intent to convert the property, and thus to defeat or destroy the interest of the bailor therein."

If the bailee misuse or abuse the property, the owner cannot justify a seizure of it by force from the personal possession of the bailee, if he can peaceably retake it. The hirer of a horse who has wrongfully used him to go upon a different journey from that contracted for, cannot be dragged from the horse while he is riding him: *Story Bailm.*, sect. 396.

Such misuser amounts to a termination of the bailment, and destroys the hirer's special property therein; and if the owner could take the chattel peaceably, and did so, he would be justified in refusing to return it to the bailee, if he believed the ill-treatment would be con-

tinued: *Trotter v. McCall*, 26 Miss. 413.

Where the chattel is used in violation of the contract, the bailor, by receiving pay for the unauthorized use, ratifies the wrongful act and cannot afterwards bring trover: *Rotch v. Hawes*, *supra*; but will not waive his right of action by receiving back the property: *Fox v. Pruden*, 3 Daly 187; *Buller's N. P.* 46. See *Reynolds v. Shuler*, 5 Cow. 323; *Livermore v. Northrup*, 44 N. Y. 107; *Austin v. Miller*, 74 N. C. 274.

The attempt to sell or otherwise transfer the chattel without the owner's consent during the term of hiring, is such a conversion by the bailee as will make him liable in trover: *Loeschman v. Machin*, 3 Eng. C. L. 359, decided in 1818, is a leading English case upon this point. This was followed by *Cooper v. Willomatt*, 50 Id. 672; *Bryant v. Wardell*, 2 Ex. 478; and *Fenn v. Bittlesdon*, 7 Exch. 152. The doctrine enunciated in these cases seems to rest upon the ground that the sale of property by a bailee is equivalent to its destruction, so far as his liability is concerned. So, in this country, the weight of authority seems to be that the bailee will be liable, or an action will lie against the purchaser if he fails to return the property to the bailor on demand: *Swift v. Morley*, *supra*; *Sargent v. Gile*, 8 N. H. 325; *Sanborn v. Colman*, 6 Id. 14; *Bailey v. Colby*, 34 Id. 29; *Johnson v. Willey*, 46 Id. 75; *Clark v. Jack*, 7 Watts 375; *Rodgers v. Grothe*, 58 Penn. St. 414. But the rule has not been followed in North Carolina: *Andrews v. Shaw*, 4 Dev. 70; *Lewis v. Mobley*, 4 Dev. & B. 323. In *Andrews v. Shaw*, the bailee of a slave for a year sold it and the owner brought trover during the year. RUFFIN, C. J., said, in reference to *Loeschman v. Mackin*: "If it is meant in that case to say that a bailee upon hire for a determinate period forfeits his interest by abuse to the article, or by a wrongful sale, so that a pur-

chaser from him gets nothing, I think it is not law. I do not know of any such doctrine of forfeiture as applied to personal chattels." See *Harvey v. Epes*, *supra*, for a minute examination of all these cases.

The use of chattels is sometimes hired where there is no actual bailment, as where the owner or his servant accompanies the chattels and works with them: *Carter v. Sreator*, 4 Jones L. 62; *Hughes v. Boyer*, 9 Watts 556. The contract then becomes special, and the bailor is answerable for the conduct of his servant. In *Hughes v. Boyer*, the owner of the horses sent a servant along to drive and take care of them. They were injured by immoderate driving, and the owner sought to hold the hirer, but the court said no. "If a horse is hired to me, and I am to ride or drive him, I am to judge of what distance he can travel in a given time, and to see that he is not overheated or too much fatigued. But if, as often happens, the owner himself goes along and drives, I have no care of the horse, and no responsibility if he is injured. But if the owner sends a driver, who is to drive, and water and feed the horses, it is as to me the same as if the owner himself drove. If his driver oversets and breaks my arm, his master is liable to me; and if, at the same time, the carriage is broken, I am not liable to the owner; it was not done by me, but by himself or his servant. But a horse may be hurt at the same time; I am not liable for that; it was the result of the carelessness or unskillfulness of the owner or his servant. And whenever the owner sends a servant to drive and take care of the horses, he who is carried has no responsibility, unless the injury occurred from some act or interference of his." But the hirer in such cases may become liable to the full extent of a bailee, by making the driver his own servant or assuming the actual management of the chattels. Thus, in *Murphy v. Kaufman*, 20 La. Ann. 559, the hirer was held for a loss of the

horses, where it appeared that he prevailed upon the driver to go to a place beyond the place agreed upon, and the horses were lost as a result. As to the measure of care required, there is a difference between a gratuitous bailee and one for hire. The former is bound to extraordinary care, and is responsible if his negligence resulted in slight injuries to the chattel: *Bennett v. O'Brien*, 37 Ill. 250; *Scranton v. Barter*, 4 Sandf. 5; see *Carrington v. Ficklin*, 32 Gratt. 670; *Patterson v. McIver*, 90 N. C. 493. But if no carelessness can be imputed to him, and he pursues the line of his duty, an injury to the chattel must be borne by the owner: *Wood v. McClure*, 7 Ind. 155; *Fortune v. Harris*, 6 Jones 532; *Carpenter v. Branch*, 13 Vt. 161. But with a hirer of a chattel the rule is otherwise. The contract is then mutually beneficial, and the bailee can only be held liable for ordinary negligence, unless he departs from the terms of his contract. Inevitable accident or superior force will excuse him from returning the chattel in as good condition as it came to him: *Vaughan v. Webster*, 5 Harr. 256; *Millon v. Salisbury*, 13 Johns. 211; *Columbus v. Howard*, 6 Ga. 213; *Field v. Brackett*, 56 Me. 121; *Watkins v. Roberts*, 28 Ind. 167; *Hyland v. Paul*, 33 Barb. 241. Story deduces the rule from his investigation of the authorities, that the hirer of chattels can only be held responsible for that degree of diligence which all prudent men use, that is, which men in general use in keeping goods of their own of the same kind. In other words, he can only be held for such injuries as come from an omission of that diligence: Story Bailm., sect. 399. *Buis v. Cook*, 60 Mo. 391.

In cases of robbery or loss by public enemies, the hirer is not answerable for the loss unless it has been occasioned by his own fault: *Coggs v. Bernard*, 2 Ld. Ray. 909; Story Bailm. sect. 526; *U. S. v. Thomas*, 15 Wall. 337; and see *State v. Moore*, 74 Mo. 414.

As to whether a bailee may contract for exemption from ordinary care or skill, see *Field v. Brackett*, 56 Mo. 121.

Burden of Proof.—It is a general rule that a party alleging a fact must prove it. So it follows that if the bailor of a chattel allege a loss or injury to it, he must prove that it was caused by the bailee's negligence. Proof of loss or injury while in the hands of the bailee is not sufficient: *Harrington v. Snyder*, 3 Barb. 380; *Newton v. Pope*, 1 Cow. 109. These were both cases of an injury to a horse by carelessness. See also *Runyan v. Caldwell*, 7 Humph. 134; *Broune v. Johnson*, 29 Tex. 43. The application of the rules concerning the burden of proof in cases of negligence, are not always clearly stated; but in general it may be said that where the property bailed is returned in a damaged state, or not at all, the bailee ought to exculpate himself, and a jury may weigh all the evidence thus submitted: *Collins v. Bennett*, 46 N. Y. 490; *McDaniels v. Robinson*, 26 Vt. 340; *Logan v. Mathews*, 6 Penn. St. 417; *Fulton v. Alexander*, 21 Tex. 148; *Goodfellow v. Meegan*, 32 Mo. 280; *Cumins v. Wood*, 44 Ill. 416.

Termination of the Bailment.—This

may be accomplished in several ways by the accomplishment of the purpose of the bailment, the destruction of the property by inevitable casualty, by mutual consent of the parties, by operation of law, as where the bailee purchases the thing hired: *Story Bailm.*, sect. 418; *Wright v. Melville*, 3 C. & P. 542; *Hatyrd v. Dechelman*, 29 Mo. 459; *Sargent v. Gile*, *supra*. If the term of hiring is fixed, the bailee should return it at that time, but if no time is fixed the law assumes a reasonable time: *Green v. Hollingsworth*, *supra*; *Cobb v. Wallace*, 5 Cald. 539. But a gratuitous bailment may be terminated at the bailor's pleasure: *Orser v. Storms*, 9 Cow. 687; *Drake v. Redington*, 9 N. H. 243. The general rule requires the bailee to return the thing hired on the determination of the contract: *Benje v. Creagh*, 21 Ala. 151. And from the very elements of his contract, if he fails to deliver it to the rightful owner, he is guilty of a conversion: *Stephenson v. Hart*, 4 Bing. 476; *Devereux v. Barclay*, 2 Barn. & Ald. 702; *Coykendall v. Eaton*, 55 Barb. 188; *Claffin v. Boston, &c., Rd.*, 7 Allen 341.

A. G. MCKEAN.

Detroit, Mich.

Supreme Court of Michigan.

FARWELL v. MYERS.

Where vendors rescind a sale on the ground of fraud, and bring replevin under which a portion of the goods is seized and returned, they cannot recover for the balance against the assigned estate of the vendee upon a claim for goods sold and delivered, but must bring an action on the tort.

CAMPBELL, C. J., and SHERWOOD, J., dissented.

ERROR to Cass.

Hiram A. Fletcher and George P. Wanty, for plaintiffs and appellants.

Howell & Carr, for defendant.

The opinion of the court was delivered by

MORSE, J.—Between August 7th and December 10th 1883, the defendant, who was then engaged in the mercantile business at Cassopolis, Michigan, bought of plaintiffs several bills of goods, amounting in the aggregate to \$10,396.69, and paid on account \$896.14. On January 4th 1884, defendant made a general assignment for the benefit of his creditors to one Henry W. Smith. This assignment is admitted to be valid, and this suit is in recognition of the same. On the eighth day of January 1884, the plaintiffs brought replevin in Circuit Court of United States for Western District of Michigan, for all the goods sold by them to Myers, as hereinbefore mentioned, and their writ of replevin mentioned and described, and commanded the marshal to take and deliver to the plaintiffs each and all the articles sold by them to him, as aforesaid. On this writ the marshal took and delivered to the plaintiffs goods therein mentioned, valued and appraised at \$3420, but which had been charged to defendant in said account at \$4104, and this latter sum made a part of the said \$9500.55. The goods so taken by the marshal were such as he found in the store, and were parts of all the different bills purchased, and he returned that he was unable to find the other goods in said writ mentioned. The plaintiffs grounded their replevin suit upon the claim that Myers did not intend to pay for the goods when he bought them, and that they had, before they brought their suit in replevin, elected to rescind the sale to him in consequence of his fraud, and gave notice of such election to the assignee before this writ of replevin issued. The replevin suit was tried upon this theory, the evidence sustained it, and the plaintiffs had judgment on the twelfth day of December 1884. On the fifteenth day of December 1884, the plaintiffs filed their claim in the clerk's office of Cass county, attached to which was a statement of their account. Plaintiffs filed their claim, basing it upon said account as for goods sold and delivered, stating that the consideration was for merchandise, and that the debt was contracted at the dates the goods were delivered, and made no mention of the suit in replevin, or the judgment therein, crediting the defendant, however, with \$2267.15, as of March 20th 1884, being, presumably, their estimation of the value of the goods recovered under their action of replevin.

These facts appeared by stipulation, and also that on the 26th of December 1884, there was still in the hands of the assignee about

\$1500, besides some collectible accounts and notes, part of which were not yet due, all of which still remained in the hands of the assignee; that the proof of claim should be considered as complying with the requirements of the statute, and the credit item of \$2267.15 should be considered as \$4104, leaving balance against the insolvent's estate of \$5396.55, and all formal defects in said proof of claim were waived. On the 13th of May 1884, thirty-nine other creditors had proven claims against said estate, aggregating \$15,368.67, and the assignee, after due notice, had declared and paid to them a dividend of 20 per cent. before the filing of plaintiffs' claim. The assignee gave all the notices required by law, of the assignment, and of proof of claims prior to January 15th 1884, and filed proof thereof as required by law, and the plaintiffs had all the statutory notices required by law prior to that date. On the 23d day of December 1884, the assignee gave notice that the claim of plaintiffs, as filed, would be contested, and the same was thereupon duly entered on the law side of the court as a cause in the name of said plaintiffs as against said defendant, and a trial was had of the same, under the statute, before the court without a jury. The circuit judge found, as a matter of law, upon the facts above stated, that the claim of plaintiffs could not be sustained, and entered judgment disallowing the same.

It is urged here that, under the facts, the plaintiffs are entitled to recover. We do not think so. Early in the proceedings, immediately after the assignment, the plaintiffs elected to rescind the sale of the goods, and brought replevin for the same on the theory that the fraud of the defendant had vitiated the sale, and that the goods belonged to them as if no sale had ever been made. After thus solemnly electing their remedy, and proceeding, through a trial to judgment, upon the theory that they owned the goods, because they failed to get adequate relief in such suit, they cannot be allowed, a year afterwards, to come into court, and base a claim upon the inconsistent idea that the goods were sold to defendant. One theory is totally at variance with the other. If one elects between two inconsistent remedies, the right to pursue the other is for ever lost: *Thompson v. Howard*, 31 Mich. 309; *Wetmore v. McDougall*, 32 Id. 276; *Dunks v. Fuller*, Id. 243; *Neild v. Burton*, 49 Id. 53.

We do not deny the right of plaintiffs to collect the balance, the value of the goods not recovered by his action in replevin, in a pro-

per action for the conversion of the same ; but he cannot do so upon the claim filed with the assignee, counting upon the original contract for goods sold and delivered. If he should elect to waive the tort, and sue in *assumpsit*, he would yet have to declare specially averring the tort: *Tregent v. Maybee*, 54 Mich. 226.

The judgment of the court below must be affirmed, with costs.

CHAMPLIN, J., concurred.

CAMPBELL, C. J., (*dissenting*).—I am unable to concur in the view that plaintiffs, by replevying a part of the goods which were fraudulently obtained from them by defendant, thereby lost their right to pursue him for the balance by an action of *assumpsit*. The right which a defrauded vendor has to reclaim goods fraudulently obtained by the purchaser is not, in any just sense, an absolute ending of their relations. The case before us in no way differs from that where a vendor enforces a right of stoppage in transitu, which does not always secure all the goods sold. In such a case the law is now clear that the effect of the reclaiming of a part of the goods is not to destroy the vendor's right to sue for the value of the remainder. It is more a matter of words than of substance, to hold that in such a case there is no interference with the contract itself; for, practically, a sale is very seriously interfered with by any retention or reclamation of the goods sold. Neither is it very important to inquire on what particular theory the plaintiffs' rights are insisted on. There can be no doubt that if the contract is considered as rescinded, the goods not replevied and disposed of by defendant must be accounted for in some way. Whether treated as sold or as tortiously converted, the plaintiffs, according to well-settled rules, could always sue in *assumpsit* for the proceeds or value, and could do so under the common counts or specially. The demand for these moneys is not one for damages at large, as for a wrong, but is a pecuniary claim based on fixed rules of recovery. I do not think there is anything in our statutes, or in bankruptcy proceedings anywhere, which would prevent the proof of any such claim for which implied *assumpsit* lies ; and it seems to me that any rule which cuts off such a redress would be in furtherance of the vendee's fraud. In *Powers v. Benedict*, 88 N. Y. 605, the doctrine was recognised that a partial recovery of goods, under such circumstances, did not bar an action for the remainder. We held, ourselves, in *Dayton v. Monroe*, 47 Mich. 193, that a person suing

for fraud was not bound to return a note which was given for the consideration as a condition of suing. And it seems to me that no doctrine can be sound which puts a person to a complete election at his peril, and bars him from any adequate remedy against the wrongdoer. Our statute concerning claims does not cut off any claim which can be regarded as an obligation of the assigning debtor, and the right to a judgment and relief is the same as if there had been no assignment. In a case of this kind no mere technicality should stand in the way of justice. That defendant is responsible for the unrecovered goods is beyond dispute. Being so, I think there should be a recovery as claimed, and that the judgment should be reversed, and a new trial granted.

SHERWOOD, J., concurred.

It is a general principle, that fraud renders a sale of chattels voidable; but what acts upon the part of the vendee, or circumstances connected with his financial standing will have this effect, is a question in dispute.

It is very generally held that fraudulent representations or the active suppression of insolvency for the purpose of obtaining a false credit, will make a sale voidable at the option of the vendor: *Cross v. Peters*, 1 Me. 376; *Redington v. Roberts*, 25 Vt. 686; *Morrill v. Blackman*, 42 Conn. 329; *Lupin v. Marie*, 6 Wend. 81; *Buckley v. Archer*, 21 Barb. 585; *Fisher v. Conant*, 3 E. D. Smith 199; *Nichols v. Pinner*, 18 N. Y. 295; *Devoe v. Brandt*, 53 Id. 462; *O'Reer v. Strong*, 13 Ill. 688; *Powell v. Bradlee*, 9 G. & J. (Md.) 220; *Conyers v. Ennis*, 2 Mason 236; *Garbutt v. Bank*, 22 Wis. 384; *Biggs v. Barry*, 2 Curtis C. C. 259; *Cross v. Peters*, 1 Greenl. 376; *Thompson v. Rose*, 16 Conn. 71.

It is sufficient that the fraudulent representations are made by a third person to whom the vendee refers the vendor: *Fitzsimmons v. Joslin*, 21 Vt. 129.

Such representations differ from a warranty in that they may be made at any time previous to the contract of sale: *Seaver v. Dingley*, 4 Greenl. 306. And fraud may be evidenced by transactions

with others about the same time: *Stewart v. Emerson*, 52 N. H. 301; *Bradley v. Obeart*, 10 Id. 477; *Wiggins v. Day*, 9 Gray 97; *Rowler v. Bigelow*, 12 Pick. 316; *Cary v. Hotailing*, 1 Hill 311; *Hennequin v. Naylor*, 24 N. Y. 139.

A preconceived design not to pay for goods is sufficient, by the great weight of authority, to make a sale voidable: *Dowd v. Tucker*, 41 Conn. 203; *Lynch v. Beecher*, 38 Id. 493; *Wiggins v. Day*, 9 Gray 97; *Dow v. Sanborn*, 3 Allen 181; *Durell v. Haley*, 1 Paige 492; *Ash v. Putnam*, 1 Hill 302; *Barnard v. Campbell*, 65 Barb. 286; *Fox v. Webster*, 46 Mo. 181; *Irving v. Motly*, 7 Bing. 543; s. c. 5 Moore & P. 380. But a contrary rule prevails in Pennsylvania, where it is held "that there must be artifice intended and fitted to deceive practised upon the vendor: *Smith v. Murphy*, 21 Penn. St. 367; *Backentoss v. Speicher*, 31 Id. 324; *Pottinger v. Heckscher*, 2 Gr. 309.

The mere fact that the vendee is insolvent, and knew himself to be so at the time of the sale, while evidence of a fraudulent intent, is not of itself sufficient to avoid the sale: *Redington v. Roberts*, 25 Vt. 686; *Patton v. Campbell*, 70 Ill. 72; *King v. Phillips*, 8 Bosw. 603; first list of cases, *ante*. But in *Mitchell v. Worden*, 20 Barb.

253, it was held, that where there had been a series of transactions between vendor and vendee, extending over a length of time, and giving rise to a trust and confidence, that an open act of bankruptcy upon the part of the vendee unknown to the vendor at the time of sale, would render it voidable.

As fraud renders a sale *voidable* and not *void*, *bona fide* purchasers, mortgagees and pledgees are protected in any rights in the chattels acquired from the vendee, previous to the vendor's electing to rescind the sale: *O. & M. Ry. Co. v. Kerr*, 49 Ill. 458; *Williamson v. Russell*, 39 Conn. 412; *Dow v. Sunborn*, 3 Allen 181; *Hoffman v. Noble*, 6 Met. 68; *Parker v. Patrick*, 5 T. R. 175; *Benj. Sales*, § 433. 3d ed.; *Story Sales*, § 446, a; *Schouler's Pers. Prop.* 638. But in *Hurt v. McNeil*, 47 Mo. 526, it was held that a *bona fide* pledgee's interest is not protected.

Attaching and execution creditors of the vendee acquire no greater rights than their debtor: *Schweizer v. Tracy*, 76 Ill. 345; *Hawes v. Dingley*, 17 Me. 341; *Jordan v. Purker*, 56 Id. 557; *Durell v. Haley*, 1 Paige 492; *Ash v. Putnam*, 1 Hill 302; *Mowrey v. Walsh*, 8 Cow. 238; *Hitchcock v. Covill*, 20 Wend. 167; *Wiggin v. Day*, 9 Gray 97; *Bussing v. Rice*, 2 Cush. 48; *Buffington v. Gerrish*, 15 Mass. 156. And it has been said that such is the case though the debt sought to be recovered, is one incurred subsequent to the sale, and upon credit of the goods: *Field v. Stearns*, 42 Vt. 111; but this proposition is disputed: *Gilbert v. Hudson*, 4 Groel. 345; *Bradley v. Obear*, 10 N. H. 477; *Thompson v. Rose*, 16 Conn. 71.

Where goods fraudulently obtained are sold in satisfaction of a pre-existing debt, the second vendee's rights in the property are subject to those of the original vendor: *Barnard v. Campbell*, 58 N. Y. 73; *Root v. French*, 13 Wend. 570; *Lupin v. Marie*, 2 Paige 170; *Jackson v. Myers*, 11 Wend. 533; *Poor*

v. Woodburn, 25 Vt. 234; *Lynch v. Beecher*, 38 Conn. 490; *McLeod v. Bank*, 42 Miss. 99; *Johnson v. Pack*, 1 Wood. & Min. C. C. 334. But see *contra*, *Waggoner v. Cooley*, 17 Ill. 239; *Lee v. Kimball*, 45 Me. 172; *Gibson v. Moore*, 7 B. Mon. 92; *Titcomb v. Wood*, 38 Me. 561; *State v. Schulein*, 45 Mo. 521; *Abbott v. Barr*, 5 Moore 98.

A third party obtaining goods with knowledge of the fraud, is not protected: *Phelps v. Conant*, 30 Vt. 277; *Allison v. Matthieu*, 3 Johns. 236; *Hyde v. Ellery*, 18 Md. 496; *Biddle v. Levy*, 1 Stark. 20; *Hill v. Perrott*, 3 Taunt. 274; 1 Chit. Pl. 100; and the burden of proof is on the party claiming *bona fides*: *Devoe v. Brandt*, 53 N. Y. 462.

A re-purchase from a *bona fide* purchaser remits the fraudulent vendee to his original position; *Schutt v. Large*, 6 Barb. 380.

Upon discovery of fraud, the vendor has an election to affirm or rescind the sale. He may waive the tort and sue in *assumpsit*: *McCullough v. McCullough*, 14 Penn. St. 295; *Butts v. Collins*, 13 Wend. 154; *Berly v. Taylor*, 5 Hil. 577; *Hinds v. Tweedle*, 7 How. (N. Y.) 278; *Kellett v. Fleet*, 7 Johns. 324; *Gray v. Griffith*, 10 Watts 431; *Sanders v. Hamilton*, 3 Dana 552; *Patterson v. Prior*, 18 Ind. 440; *Jones v. Gregg*, 17 Id. 84; *Johnson v. Reed*, 3 Eng. 202; *O'Conley v. Natchez*, 1 Sm. & M. 31; *Foster v. Stewart*, 3 M. & S. 191; *Gill v. Kyner*, 5 Moore 525. The weight of authority seems to favor the doctrine, that, if he adopts this course, he must wait till the expiration of any credit given: 1 Chit. Pl. 107; *Dellone v. Hull*, 47 Md. 112; *Ferguson v. Carrington*, 9 B. & C. 59. In *Strutt v. Smith*, 1 C., M. & R. 411, the court say, "It is clear that the plaintiffs cannot avail themselves of the defendant's fraud, so as to rescind the contract, and substitute a new contract of sale on different terms."

Other courts permit *assumpsit* to be

brought before the expiration of the credit: *Mann v. Stowell*, 3 Chand. (Wis.) 243; *Hogan v. Shee*, 2 Esp. 322; *De Symons v. Minchweich*, 1 Id. 430. So in *Wigand v. Sichel*, 3 Keyes (N. Y. Ct. App.) 120, it is said that "It is not accurate to say that the plaintiffs sought to avoid the contract of sale. It is the credit only, that is sought to be avoided." The doctrine of this decision is criticised and rejected in *Kellogg v. Turpie*, 93 Ill. 269.

Where the latter rule prevails, assumption would probably lie in all cases, though the goods had not been converted to money: *Roth v. Palmer*, 27 Barb. 652; *Putnam v. Wise*, 1 Hill 234; *Chambers v. Lewis*, 2 Hilt. 591; *Fiquet v. Allison*, 12 Mich. 328; *Stockett v. Watkins*, 2 Gill & Johns. 326.

It is a general rule, however, that goods fraudulently obtained, must have been converted to money before assumption lies: *Emerson v. McNamara*, 41 Me. 565; *Smith v. Smith*, 43 N. H. 536; *Phelps v. Conant*, 30 Vt. 277; *Winchell v. Noyes*, 23 Id. 303; *Gilmore v. Wilbur*, 12 Pick. 120; *Jones v. Hoar*, 5 Id. 285; *O'Reer v. Strong*, 13 Ill. 688; *Morrison v. Rogers*, 2 Scan. 317; *Willet v. Willett*, 3 Watts 277; *Schweizer v. Weiber*, 6 Rich. (S. C.) 159; *Hutchinson v. Phillips*, 6 Eng. 270; *Lindon v. Hooper*, Cowp. 419. If the vendor elect to rescind the sale, replevin will lie for the goods or trover for their value: *Brown v. Pierce*, 97 Mass. 49; *Kline v. Baker*, 99 Mass. 255; *Seaver v. Dingley*, 4 Greenl. 306; *Prentiss v. Russ*, 16 Me. 60; *Durrell v. Haley*, 1 Paige 492; *Noble v. Adams*, 7 Taunt. 59.

It has been held that the vendor may retake the property by stratagem: *Earl Bristol v. Wilmore*, 2 Dowl. & Ryl. 755. Or by the use of necessary force: *Hodgden v. Hubbard*, 18 Vt. 504; *Patrick v. Colerick*, 3 M. & W. 482.

A carrier who has been induced to

part with chattels by fraudulent representations may replevy them; *Bigelow v. Heaton*, 6 Hill 44.

The evidence of fraud to justify a rescission must be clear: *Henshaw v. Bryant*, 4 Scan. 387; *Warren v. Walbridge*, 61 Ill. 173; *Martin v. Wirtz*, 11 Bradw. (Ill.) 567. And the right of election must be exercised within a reasonable time after discovery of the fraud: *Bulkley v. Morgan*, 46 Conn. 393; *Emerson v. McNamara*, 41 Me. 565; *Johnson v. McLane*, 7 Blackf. 501; *Stewart v. Dougherty*, 3 Dana 479; *Hopkins v. Appleby*, 1 Stark. 477; *Cash v. Giles*, 3 Car. & P. 407.

It is a general principle that a vendor electing to rescind, must rescind the contract in toto, and place the other party in *statu quo*: *Cushing v. Wyman*, 38 Me. 589; *Tisdale v. Buckmore*, 33 Id. 461; *Cushman v. Marshall*, 21 Id. 122; *Ayers v. Hewett*, 19 Id. 281; *Norton v. Young*, 3 Greenl. 30; *Poor v. Woodburn*, 25 Vt. 234; *Allen v. Edgerton*, 3 Id. 443; *Kimball v. Cunningham*, 4 Mass. 502; *Moyer v. Shoemaker*, 5 Barb. 322; *Fisher v. Conant*, 3 E. D. Smith 199; *Fisher v. Fredenhull*, 21 Barb. 82; *Rutter v. Blake*, 2 Har. & J. 353; *Johnson v. McLane*, 7 Blackf. 501; *Moriarty v. Stofferan*, 89 Ill. 528; *Jennings v. Gage*, 13 Id. 612; *Buchenau v. Horney*, 12 Id. 336; *Weed v. Morris*, 7 Wis. 503. And if this can not be done, his remedy is by an action on the case for deceit: *Hogan v. Weyer*, 5 Hill 389; *Connor v. Henderson*, 15 Mass. 319; *Perley v. Balch*, 23 Pick. 283; *Coolidge v. Brigham*, 1 Met. 550; *Hammond v. Buckmaster*, 22 Vt. 375; *Blackburn v. Smith*, 2 Exch. 783; *Hunt v. Silk*, 5 East. 449; *Beed v. Blandford*, 2 You. & Jer. 278.

The tender back of the consideration received must generally be made before trial, but it is sufficient to tender a note at the trial: *Thurston v. Blanchard*, 22 Pick. 18; *Nichols v. Michael*, 23 N.

Y. 264; *Ryan v. Brant*, 42 Ill. 78; *Emerson v. McNamara*, 41 Me. 565.

Having made his election the vendor is bound by the choice, and can not afterwards pursue an inconsistent remedy: *Joslin v. Cowee*, 52 N. Y. 90; *Bank v. Beale*, 34 Id. 473; *Fanchon v. Goodman*, 29 Barb. 315; *Butler v. Hildreth*, 5 Met. 49; *Brinley v. Tibbits*, 7 Greenl. 70; *Jenkins v. Simpson*, 14 Me. 364; *Dibble v. Sheldon*, 10 Blatchf. 178; *Floyd v. Browne*, 1 Rawle 121; *Kitchen v. Campbell*, 3 Wils. 308; *Bennet v. Francis*, 4 Esp. 28; *Brewer v. Sparrow*, 1 M. & R. 2; *Bulkley v. Morgan*, 46 Conn. 394; *Morris v. Rexford*, 18 N. Y. 552.

If the fraud is discovered during the course of legal proceedings, to enforce the contract, the vendor must not proceed to judgment, or he will be held to have affirmed the contract: *Lloyd v. Brewster*, 4 Paige 541.

In *Dean v. Yates*, 22 Ohio St. 388, a suit in attachment was held not an affirmation of the contract: *contra*, *Bulter v. Hildreth*, 5 Met. 49; while in *Gray v. St. John*, 35 Ill. 222, it was re-

garded sufficient evidence to prove a *prima facie* affirmation.

Upon the distinct question in the main case the precedents are few. In *Voorhes v. Earl*, 2 Hill 288, it seems to have been held that a vendee cannot rescind as to part of goods sold on account of fraud, and affirm as to the remainder.

In *Morford v. Peck*, 46 Conn. 384, it was admitted as law, that where a portion of goods fraudulently obtained have been resold to a third party having knowledge of the fraud, the fact that the original vendee has been sued in assumption for the portion not sold by him, will not bar an action of replevin for the portion in possession of the second vendee; the court recognising the distinction that a sale may be affirmed as part of goods sold and rescinded as to the remainder, where the division of the property was beyond the control of the original vendor. This rule would seem conformable to justice, if not to the more general rules of the precedents.

CHAS. A. ROBBINS.

Chicago.

642217 Court of Appeals of Maryland.

SEEMULLER v. FUCHS.

An auctioneer has all the liabilities of an ordinary agent. He is not, like a sheriff, a public officer.

An auctioneer selling goods "as auctioneer," but without naming the person for whom he sells, is liable as if selling for himself, and if the title turns out defective, may be sued by the vendee, independently of the doctrine of implied warranty of title, in an action for money had and received, on the ground that the consideration has wholly failed.

An auctioneer sold a piano at public auction, "as auctioneer," but without naming his principal. One with a superior title to the piano took it from the vendee, who thereupon sued the auctioneer to recover back the purchase-money. Held, that the auctioneer was liable.

The opinion of the court was delivered by

ROBINSON, J.—One Weeks, being in the possession of a piano

under a contract of hiring, sent it to the ware rooms of the appellants, who are auctioneers, to be sold. It was sold by them at auction without disclosing the name of the owner, and was bought by the appellee. The piano was subsequently replevied by the owner, and this suit is brought by the purchaser against the auctioneers, to recover the money paid on account of the purchase.

Now we take the law to be well settled that one selling property as an agent, without disclosing the name of the principal, binds himself personally. In such cases the purchaser has the right to rely on the responsibility of the agent, by whom the sale is made, and is not obliged to rely on the responsibility of an unknown, and perhaps irresponsible principal. The same will apply to sales made by auctioneers.

Whether the doctrine of implied warranty of title attaches to a sale made by an auctioneer, for the breach of which he should be liable for unliquidated damages, is a question not necessary to be decided in this case. Be this as it may, it is clear, we think, both in reason and authority, that if a sale is made by an auctioneer, without disclosing the name of the owner, and the property is afterwards claimed by a superior title, the purchaser may, in an action for money had and received, recover the purchase-money of the auctioneer. There is, in such a case, an entire failure of consideration, and the sale having been made by the auctioneer, the only person known as vendor, it is just and right that he should be answerable to the purchaser. There is certainly no hardship in this rule of law, because the auctioneer knows the person on account of whom the goods are sold, and has it in his power to protect himself against loss. Any other rule, would not only be a fraud on purchasers, but destructive of all confidence in auction sales. So far back as *Hanson v. Roberdean*, Peake's N. P. 120, Lord KENYON said, that though where an auctioneer names his principal, it is not proper that he should be liable to an action, yet it is a very different case when the auctioneer sells the commodity without saying on whose behalf he sells, and in such a case the purchaser is entitled to look to him personally for the completion of the contract. We have not been able to find a single case in conflict with the rule thus laid down. On the contrary, it is sustained by all the subsequent decisions, both in England and this country: *Jones v. Littledale*, 6 A. & E. 486; *Mills v. Hunt*, 20 Wend. 431; *Franklin v. Lamond*, 4 C. B. 637. And in all the text-books the prin-

ciple is laid down in the broadest terms. In his work on agency, Judge STORY says: "Thus, where a contract is made with an auctioneer for the purchase of goods at public sale, and no disclosure is made of the principal on whose behalf the commodity is sold, the auctioneer will be liable to the purchaser to complete the contract, although from the nature of public sales, it is plain he acts as agent only;" STORY on Agency, sect. 267. Again, in ADDISON on Contracts, the author says: "Every auctioneer who sells without, at the time of the sale, disclosing the name of his principal, contracts personally;" p. 642. In BABINGTON on Auctions, 9 LAW LIB., sect. 185, the rule is laid down: "When an auctioneer does not disclose the name of his principal at the time of the sale, he is personally liable to an action for damages for not completing the contract." The cases relied on by the appellant, are cases in which the sales were made by administrators or executors or trustees, or by sheriffs or other officials, in which the nature and character of the sales and the objects for which they are made, are well known to the purchaser. Besides, one making a sale in an official capacity, cannot, for reasons of public policy, be held personally responsible, for otherwise, "no one," as Judge ARCHER says in *Moebee v. Gardner*, 2 HAR. & GILL 176, "could be induced to accept the office." It can hardly be said that an auctioneer is in this sense a public officer. There is a tax, it is true, upon the receipts of sales made by him, and he is appointed and required to give bond, but the tax is laid for the purpose of revenue, and the appointment and requirement to give bond, are provisions of the law to secure the prompt payment of the tax as thus levied. His business is essentially a private one; he may sell or not, as he pleases, and is not, in any respect, under the slightest obligation to the public. For these reasons the judgment below must be affirmed.

ALVEY, C. J., delivered the following dissenting opinion, in which Judge BRYAN concurred.—The theory upon which this case was tried in the court below must have been that there was an implied warranty of title by the auctioneers who sold the piano to the plaintiff at public auction. Hence the court was asked to affirm, and did affirm at the instance of the plaintiff, that if it should be found upon the evidence that the defendants had no title to the piano, and no lawful or rightful authority to sell the same, and that the true owner of the piano, subsequent to the sale, replevied the same

from the plaintiff, then the verdict must be for the plaintiff, though it should be further found that the defendants, at the time of the sale, were auctioneers, and that the piano was sold by them at public auction. And on the part of the defendants, they refused to affirm, that if it should be found from the evidence that the piano had been brought to the auction rooms of the defendants for sale at public auction, and that they made an advance thereon, and advertised and sold the piano expressly in their character of auctioneers, in the usual course of making auction sales, and that the defendants acted in all respects in good faith, and the plaintiff knew at the time that they were acting in their representative character of auctioneers and not as owners; and that upon making the purchase the plaintiff paid the price of the piano and removed the same, and the defendants settled their accounts with the party for whom they sold the piano before they had any notice of any question in regard to the title to the piano, or of the plaintiff's claim to recover back the price paid therefor; then the plaintiff was not entitled to recover back the price thus paid. These propositions manifestly had reference to and were meant to present the question, whether or not there was an implied warranty of title by the auctioneers; and the affirmative of that proposition seems to have been held by the court, for it not only granted the plaintiff's prayer but in the judgment rendered (the court acting without a jury), the amount recovered is the full price paid for the piano with interest, and not simply the amount retained by the defendants for the advance made by them before the sale; a result that could not have been arrived at, upon the facts of the case, except upon the theory of an implied warranty of title.

There can be no doubt that as a general principle, in every sale of personal chattels there exists an implied warranty of title by the vendor, unless such warranty is expressly negatived, or negatived by the special circumstances of the case: *Mockbee v. Gardner*, 2 H. & G. 176; *Rockwell v. Young*, 60 Md. 563. The doctrine of *caveat emptor* is but an exception to, or modification of this general principle, in its application to the sales of personal property. And the question here is, whether in a sale of a personal chattel by an official licensed auctioneer, in the city of Baltimore, made in the usual course of his business, there is an implied warranty of title by the auctioneer personally, where the name of the principal is not given at the time of the sale.

A general licensed auctioneer, appointed by the state, is a general

commercial agent, and as such, he is subject to regulations in the performance of his duties by the statute law of the state. For the city of Baltimore, auctioneers not to exceed twenty in number, are authorized to be appointed by the governor of the state, by and with the advice and consent of the senate, for the term of two years. He qualifies by obtaining a license, for a fee to the state, and by giving bond, conditioned for the duties prescribed by law upon his sales, "and that he will in all things, well, truly and faithfully behave and conform himself according to the true intent and meaning of the law." The duties upon sales are prescribed, and the auctioneer is required to make quarterly reports of his sales, and to account for the duties thereon, and his commissions are regulated by law. And any person acting as auctioneer without conforming to the provisions of law, is declared to be guilty of a misdemeanor: vol. 2, Code, sects. 85 to 131, as modified by the Act of 1872, ch. 249.

By a well settled principle of law, an auctioneer has a special property in the goods intrusted to him for sale, and he has a lien on the same, and the proceeds thereof for the charges of sale, his commissions, and the auction duty which he is bound to pay. And having such special property in the goods intrusted to him he may sue the purchaser thereof in his own name, or in the name of his principal, at his election. He is also for certain purposes deemed personally the vendor to the purchaser at the sale, unless the name of the principal be disclosed, and the latter be treated as the party making the sale. But this is so only in a special sense; for in many cases the auctioneer is deemed the agent of both vendor and vendee, though the name of the principal vendor be not disclosed by the auctioneer at the time of the sale: *Williams v. Milington*, 1 H. Bl. 81; Story Ag., sects. 27, 107, 108. If, however, the sale at auction be made without disclosing the name of the principal at the time of sale, the purchaser is entitled to look to the auctioneer personally for the delivery of the goods sold, and the completion of the contract; and if default be committed in this respect, the auctioneer is personally liable to the purchaser in damages: 2 Kent Com. 536; *Hanson v. Roberdeau*, Peake's Cas. 120; *Woolfe v. Horne*, 2 Q. B. Div. 355. But it does not follow from this that he is to be held liable as for an implied warranty of title to the goods sold.

In England, until within a comparatively recent period, it had

been an unsettled question, whether, in any case of the sale of a chattel in possession, and where the possession passed to the vendee by the contract of sale, there was any implied warranty of title. But since the case of *Eicholz v. Bannister*, 17 C. B. (N. S.) 708, decided in 1864, it seems to be regarded as settled, according to Mr. Benjamin (Sales, 2d English ed. 523), that "a sale of personal chattels *implies an affirmation* by the vendor that the chattel is his, and therefore he warrants the title *unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership*, but only to transfer such interest as he might have in the chattel sold." This is the English rule as between the vendor, the owner of the chattel or the party who asserts ownership in himself and the vendee. But does the same rule apply as between an official auctioneer, who sells in a representative capacity and the purchaser of the chattel at an auction sale? Of course, if the auctioneer in fact sells his own goods, or if he affirms the ownership to be in himself, or if he refuses upon request to disclose the name of his principal, he would be held to warrant the title; or if he make fraudulent representations as to the title of the property sold by him, whereby the purchaser is deceived to his injury, he would be liable upon failure of title as for deceit. But the reason of the rule upon which the doctrine of implied warranty of title is founded would seem clearly not to apply where the sale is simply made in fact by the auctioneer, *bona fide*, in his representative character, with no assertion or affirmation of title in himself, or representation whereby the purchaser is deceived. And hence with the rule established in England as I have stated it, it is laid down in all the recent text writers treating of the subject, that "whenever a man sells goods generally, and not in any particular character or capacity, such as auctioneer, agent, sheriff, pawnbroker, pledgee, &c., he must be taken to sell as owner;" but "whenever a man does not sell goods as owner, but in some special character or capacity, and the purchaser has notice thereof, he is bound to look into the title of his vendor; for there is not under such circumstances, any implied warranty of title on the part of the vendor." 2 Add. on Contr. (8th ed.) 971, 972; Bateman on Auction Sales 193; see *Simms v. Marryat*, 20 L. J. Q. B. 458. The auctioneer or party selling in a special character, merely undertakes that he does not at the time he sells, know of any defect in his authority or right to sell; and he cannot be made responsible after he has paid over the pro-

ceeds to his principal, for the payment of the purchase-money to the vendee, unless it can be shown that he knew he had no right to sell or to pay over, and that consequently, his conduct was fraudulent: 2 Add. on Contr. 972; *Chapman v. Spiller*, 14 Q. B. 621. The same general principle is laid down by the American text writers, as will be seen by reference to 1 Pars. on Contr. (4th ed.) 456, 458, and notes; and to Story on Sales, sect. 367 *a*. The general doctrine is well illustrated by the case of the sale of an unredeemed pledge by a pawnbroker. The pawnbroker as bailee, like a general auctioneer, is placed in possession of the goods, and he has power of sale upon default of the pawnor. In making the sale he only warrants the subject-matter of the sale to be a pledge, and that the time for its redemption has expired. He does not by implication warrant the title, or that the purchaser will not be evicted. As he sells in a special character, he is understood only to sell such interest as he may have in the subject-matter of the sale; and if the purchaser does not look into the matter of title, and it subsequently appears that the pledgor had no title to pledge, nor the pawnbroker to sell, and the purchaser is evicted, he cannot recover compensation for his loss upon any principle of implied warranty of title. This would seem to be settled upon unquestionable authority. In the leading case of *Morley v. Attenborough*, 3 Exch. 500, the defendant, a pawnbroker, had a harp pledged with him in the way of his business, and the time having elapsed for its redemption, and the pledge being unredeemed, offered it for sale through certain auctioneers who sold it to the plaintiff. It turned out that the harp had been pledged to the defendant by a person who had no title to it, and the real owner obliged the plaintiff to give it up, after it had been delivered to him by the defendant. And the question, and only question as the case was presented on the pleadings, was as to the extent which the defendant by implication warranted against the eviction of the plaintiff. PARKE, B., who delivered a thoroughly considered judgment, in the course of his opinion said, "We do not suppose that there would be any doubt, if the articles were bought in a shop professedly carried on for the sale of goods, that the shopkeeper must be considered as warranting that those who purchase will have a good title to keep the goods purchased. In such a case the vendor 'sells as his own,' and that is what is equivalent to a warranty of title. But in the case now under consideration, the defendant can be made responsible only as on a sale of a *forfeited pledge eo nomine*.

Though the harp may not have been distinctly stated in the auctioneer's catalogue to be a forfeited pledge, yet the auctioneer had no authority from the defendant to sell it except as such. The defendant, therefore, cannot be taken to have sold it with a more extensive liability than such a sale would have imposed upon him; and the question is, whether on such a sale, accompanied with possession, there is any assertion of an absolute title to sell, or only an assertion that the article has been pledged with him and the time allowed for redemption passed." And the conclusion was, that it was unreasonable to consider the pawnbroker, from the nature of his occupation, as having undertaken anything more than that the subject-matter of sale was a pledge and irredeemable, and that he was not cognisant of any defect of title to it; and it was so held by the whole court.

The distinction thus made between the case of a party selling as owner and affirming the title to the chattel to be in himself, and the case of a sale made by a party in his representative capacity and without any such affirmation of title, is founded in the plainest reason and justice. A licensed bonded auctioneer in the city of Baltimore is not only an agent for those who intrust their property to him for sale, but he is a public officer. He is required to account to a public functionary for the duties on his sales and to his principals for the proceeds of the sales made by him, and that without delay.

And that being so, there is no principle in the law better settled than that where one person deals with another, knowing that other to be an agent, though even of an undisclosed principal; such person has no right to require the agent to restore to him money which the agent has accounted for and paid over to his principal before notice of any adverse claim. When money so paid to an agent has been once *bona fide* parted with, without notice, the liability of the agent ceases, and the claim of the party paying it can be enforced only against the principal to whom the money has been paid over: *Holland v. Russell*, 1 B. & A. 424; *Shand v. Grant*, 15 C. B. (N. S.) 324; *Edwards v. Hodding*, 5 Taunt. 815. If he is to be held to warrant, by implication, the title of all the property he sells how is he to be indemnified against liability upon payment over of the proceeds of sale? It is obvious, his position would be one of great peril, unless he were to proclaim the name of his principal in the sale of each and every article sold by him, and to do that would,

in many cases, defeat one of the statutory objects of auction sales at regular auction rooms, at which parties might not, for obvious and entirely justifiable reasons, desire their names to be proclaimed in connection with the property offered for sale. If any purchaser desired the name of the real owner, it would be the duty of the auctioneer to disclose it; or, upon his refusal, he would be held to have assumed the position and liability of such owner. This rule would seem to afford to purchasers all the protection that they could in reason ask of the auctioneer. It was said by the Court of Appeals, in *Mockbee v. Gardner*, *supra*, in speaking of the exemption of executors, trustees, &c., from liability for implied warranty of title, that the exemption of such agents from personal liability on such warranties would seem to be indispensable. For, as there asked, who would accept an office of the kind, if he were to become necessarily the guarantee of the good title to him whom he represents, in all the property committed to his charge, and which he might be required to sell? In all cases in which the title sold was ascertained to be defective after final distribution of the estate, the trustee, if a recovery were had against him, would have to look for indemnity to creditors, distributees, &c. In most instances, his prospect of security would never be realized, and no power is given him to retain for such a contingency. And while that is so with respect to executors, trustees and others, the same reasoning applies to the case of an official auctioneer. He, too, is required to pay over the proceeds of sale, and if the title of the property were afterwards found to be defective, he might, in many cases, be left without means of indemnification. Therefore, it would seem to be unreasonable to hold, that an official auctioneer, when acting in his representative capacity, and in the usual course of his business, warrants by implication the title to the property sold by him, in the absence of other circumstances, to which I have referred, by which he may fix liability upon himself as if he were owner.

It is supposed that the case of *Fisher v. Rieman*, 12 Md. 497, has some bearing upon the question under consideration. But an examination of that case will show that it has no bearing whatever. That was a case where the defendant, a bill and note broker, acting for an undisclosed principal, sold and passed by delivery merely, without endorsement, a negotiable promissory note to the plaintiff, making no express warranty or representation in regard to the genuineness of the signatures to the note, and being entirely ignorant

of the fact that any of them were forged ; but two of the signatures thereto proved to be forged, and the question was whether there was an implied warranty by the broker of the genuineness of the signatures to the note ; and the court held that there was not. That the only implied warranty involved in the sale was, that the broker was lawfully entitled to dispose of the note to the plaintiff, about which there was no contention. The broker acting in good faith had the right to dispose of the paper on the market for what he could get for it, and there was no question as to the existence of any paramount title to the paper in a third party. That case, therefore, can have no special bearing upon the question involved in the case before us.

Here there can be no pretence whatever, that the plaintiff was not aware of the fact that the defendants were acting in their representative character as auctioneers in the sale of the piano. He states himself that he had examined the piano at the warehouse of the defendants before it was offered for sale, and that he had been informed by one of the defendants that they had made an advance upon it of \$100, in anticipation of the sale ; and with that information he became the purchaser at public auction. It is made clear from the evidence that the legal title to the piano was in F. G. Smith, and that it had been hired to one Weeks, from whence it got into the possession of Davis, who placed it with the defendants for sale. There is no evidence, however, to show that the defendants were aware, or had any reasonable ground to suspect, that the title of Davis, or that of the party for whom he acted, was not good. And upon these facts I am clearly of opinion that there was no implied warranty of title by the defendants.

The auction sale, however, failing to pass title to the plaintiff, and the property having been taken from him by the owner, there was a failure of consideration for the money paid to the defendants on the purchase. And as it appears that the larger part of the money so paid is still retained by the defendants, for the advance made on the piano, and for expenses and commissions, that much of the price is, in contemplation of law, money had and received for the use of plaintiff, and he may, under the declaration of this case, recover it of the defendants. The latter cannot, either by law or equity, apply the money received of the plaintiff, on a consideration which has wholly failed, to the payment of a debt due from a party who had no title to the property.

The right of the plaintiff, then, to recover of the defendants, is fully recognised by the Court of Appeals, in the case before referred to, of *Mockbee v. Gardner*, 2 H. & J. 177, 178. See also, *Franklin v. Armfield*, 7 G. & J. 407.

From what I have said, it follows, that the instruction granted at the instance of the plaintiff, based as it is on the theory of an implied warranty of title by the defendants personally, was erroneous; but that there was no error in refusing the prayers offered by the defendants. In my opinion, therefore, the judgment of the court below should be reversed, and a new trial awarded; and in this opinion, Judge BRYAN authorizes me to say he concurs.

Supreme Court of Wisconsin.

EDGERTON v. MICHELS.

The general rule in this country is, that where there is a sale of chattels in the vendor's possession at the time, at a fair price, there is always an implied warranty of title, unless the facts and circumstances are such as to warrant a different conclusion.

One intrusted with the possession, management, control and disposal of goods to be sold, is an agent and not a broker, and is liable upon an implied warranty of title.

APPEAL from Circuit Court, Milwaukee County.

This was an action to recover the price of goods sold by plaintiff to defendant. The defence was that the goods had been stolen and were afterwards reclaimed from defendants by the true owner. The court below directed a verdict for plaintiff. The facts sufficiently appear in the opinion.

Jenkins, Winkler, Fish & Smith, for respondents.

Markham & Noyes, for appellants.

The opinion of the court was delivered by

CASSODAY, J.—Upon the facts stated was the court justified in directing a verdict against the defendants on their counter-claim, and in favor of the plaintiffs for the full amount of their claim? The cattle had been stolen by Eddy, *alias* Sherman, prior to the sale to the defendants, and that fact was unknown to both parties until after the plaintiffs had paid Eddy, and the defendants had paid

the plaintiffs, and the cattle had been shipped to Chicago, where they were reclaimed by the true owner. The plaintiffs contend that they were middle-men, brokers or agents for Eddy, who was present, to the knowledge of the defendants, during the negotiations, and assented to the price agreed upon; and hence that they are not liable upon an implied warranty of title. The defendants insist that the plaintiffs took the cattle from Eddy into their own possession, negotiated the sale to them in their own name, procured the weighing and yarding of the cattle, and the weighmaster's ticket for the same, advanced to Eddy the full price the defendants agreed to give, less the yardage and their commissions, when Eddy disappeared, and then that the plaintiffs retained the cattle until two days afterwards, when they delivered the ticket to the defendants and received from them the full contract price; and that these things, taken together, made the plaintiffs factors or commission-men for the sale of the cattle. We think the evidence was sufficient to have justified the jury in finding the facts as claimed by the defendants. Upon such facts were the plaintiffs in the transaction factors, commission-men, or mere middle-men—brokers—agents? An agent employed to sell personal property intrusted to his possession by or for his principal, for a compensation commonly called "factorage" or "commission," is a factor. As such he may sell on credit, unless contrary to instructions or custom. He may sell for his principal in his own name, and then sue in his own name for the price. He is intrusted with the possession, management, control and disposal of the goods to be sold, and has a special property in them, and a lien upon them. He may retain possession until his advances, expenses and commissions are paid: 1 Story Ag., §§ 33, 34 a, 110-113; *Price v. Wisconsin M. & F. Ins. Co.*, 43 Wis. 276, 277; *McGraft v. Rugee*, 60 Id. 409; 58 Amer. Dec. 159-171.

On the other hand a broker is an agent, employed to make bargains and contracts between other persons in matters of trade, commerce or navigation, for a compensation commonly called "brokerage." He is not authorized to buy or to sell property in his own name, but only in the name of his principal. He is not intrusted with the custody or possession of the property bought or sold, and consequently has no special property or lien upon it. He is strictly, therefore, a middle-man, or intermediate negotiator between the parties. Ordinarily he has no authority merely by virtue of his

agency to receive payment for property sold by him : Story Ag., §§ 28, 34, 109; *Price v. Wisconsin M. & F. Ins. Co.*, *supra*. We are clearly of the opinion that the evidence given upon the trial would have justified the jury in finding that in the transaction in question the plaintiffs acted as factors, and not merely as brokers or middle-men. Treating them as factors, as we must on this appeal, they must be held to all the responsibilities of factors selling property in their own name for a disclosed principal. The fact that the plaintiffs fully paid Eddy for the cattle some considerable time prior to delivering the weighmaster's ticket to the defendants, and receiving from them pay for the cattle, makes the case partake very much of a purchase by the plaintiffs, and then a resale by them to the defendants. It is well settled in this country, that the sale of chattels acquired from any one who had stolen them, passes no title even to an honest purchaser, and the true owner may maintain an action for the property without any previous demand: *Dame v. Baldwin*, 8 Mass. 518; *Heckle v. Lurvey*, 101 Id. 345; *Hoffman v. Carow*, 22 Wend. 285. The same is true of chattels sold by one who is not the owner and has no authority to sell: *Coombs v. Gordon*, 59 Me. 111; *Bryant v. Whitchee*, 52 N. H. 158; *Gilmore v. Newton*, 9 Allen 171; *Quinn v. Davis*, 78 Penn. St. 15; *Ventress v. Smith*, 10 Pet. 161; *Black v. Jones*, 64 N. C. 318; *Fawcett v. Osborn*, 32 Ill. 411; *Wheelwright v. Depeyster*, 1 Johns. 471.

The question whether an implied warranty of title attached to the sale from the plaintiffs to the defendants, does not seem to be definitively and conclusively settled as a matter of law. Undoubtedly, the civil law annexed such a warranty on the part of the vendor to every sale of a chattel. The earlier English cases indicated a contrary doctrine: *Morley v. Attenborough*, 3 Exch. 500. The later English cases indicate that such a warranty may be inferred from the mere fact of sale under certain circumstances. Thus in *Eichholz v. Bannister*, 17 C. B. N. S. 708, it was held: "In the case of goods sold in an open shop or warehouse, there is an implied warranty on the part of the seller, that he is the owner of the goods; and if it turns out otherwise, as where the goods are claimed by the true owner from whom they have been stolen, the buyer may recover back the price as money paid upon a consideration which has failed." The general rule in this country undoubtedly is, that where there is a sale of chattels in the vendor's possession at the time, at a fair price, there is always an implied

warranty of title, unless the facts and circumstances are such as to warrant a different conclusion. For discussions of the question and authorities bearing upon it, see *Lane v. Romer*, 2 Pin. 404; *Cos-tigan v. Hawkins*, 22 Wis. 74; *Shattuck v. Green*, 104 Mass. 42; *Patee v. Pelton*, 48 Vt. 182; *Peoples' Bank v. Kurtz*, 99 Penn. St. 344; 2 Schouler's Per. Prop., sects. 375-379; 2 Benj. Sales, sects. 948-964; *Scott v. Hix*, 62 Am. Dec. 458 and notes, 460-468; *Fawcett v. Osborn*, *supra*; *Burt v. Dewey*, 40 N. Y. 283; *Defreeze v. Trumper*, 1 Johns. 274; 22 Am. L. Reg. 85.

The case was not submitted to the jury at all, and, of course, was not determined upon the theory indicated. There certainly is no conclusive presumption of law in a case like this, but rather a mixed question of law and fact. As the case now stands, we refrain from any further discussion. The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

There are two main points involved in these decisions, as follows: First, In a sale of chattels, admitting that there is no warranty of title, can the purchase-money be recovered, if the title turns out to be bad, on a count for money had and received as for a consideration which has wholly failed? Second, Is there any implied warranty of title where the vendor sells, not as owner but in some particular representative capacity?

I. Caveat Emptor as to Title.—The rule of *caveat emptor* applies where there is no warranty of title, just as it does when there is no warranty of quality, and the purchaser has no remedy. See Cro. Jac. 197, per TANFIELD, C. B.; Noy's Maxims, c. 2; Co. Lit. 102 a; 2 Kent Com. 478; *Medina v. Stoughton*, 1 Salk. 219; *Morley v. Attenborough*, 3 Exch. 500, 510; *Eichholz v. Bannister*, 17 C. B. N. S. 708, 722; *Scranton v. Clark*, 39 N. Y. 220, 223; *Huntingdon v. Hall*, 36 Me. 501, 503. In Noy's Maxims, c. 42, it is said, "If I take the horse of another man and sell him, and the owner take him over again, I may have an action of debt for the money; for the bargain was perfect by the delivery of the horse, and *caveat emptor*;" and in

Coke Lit. 102 a, Coke says, "note that by the civil law every man is bound to warrant the thing he selleth or conveyeth, albeit, there be no express warranty; but the common law bindeth him not unless there be a warranty; either in deed or in law, for *caveat emptor*." In *Morley v. Attenborough*, 3 Exch. 500, 510, it is said "There is by the law of England no warranty of title in the actual contract of sale, any more than there is of quality. The rule of *caveat emptor* applies to both." In *Eichholz v. Bannister*, 17 C. B. N. S., 708, 721, it is said that where there is no warranty, "*caveat emptor*, you have no remedy, though it turn out that I have no title."

This means that if I buy an article the title of which is not warranted, and the title proves bad, I have no remedy, I cannot recover the price paid for money had and received for my use, on the ground that the consideration has wholly failed; I have bought at my risk; I have gotten what I bargained for, and if it is taken from me I must bear the loss. *Morley v. Attenborough* and *Eichholz v. Bannister*, cited above, were both cases where suit was brought on the common counts. Indeed it was only because there

was no remedy without a warranty, that the doctrine of implied warranty of title grew up and was gradually extended till now the cases where the doctrine does not apply are the exceptions.

II. Implied Warranty of Title.—Rule.

A warranty of title is implied when a man sells goods which are in his possession as owner, but not if the goods are out of the vendor's possession or in his possession in some particular capacity.

1. A warranty of title is implied in all sales of chattels by the vendor in possession of them; if nothing further appears, it is presumed that he holds them as owner and covenants and warrants that he is owner, *i. e.*, that he warrants the title to them: *Benj. Sales*, sect. 627, &c.; *Shattuck v. Green*, 104 Mass. 42, 45; *Byrnside v. Burdette*, 15 W. Va. 702; see *Gaylor v. Copes*, 16 Fed. Rep. 49; *Cozzins v. Whitaker*, 3 Stew. & Por. 322; *Ricks v. Dillahunt*, 8 Port. 134; *Williamson v. Sammons*, 34 Ala. 691; *Gross v. Kierski*, 41 Cal. 111; *Lines v. Smith*, 4 Fla. 47; *Morris v. Thompson*, 85 Ill. 16; *Marshall v. Duke*, 51 Ind. 62; *Huckleman v. Harrison*, 50 Id. 156; *Puyn v. Rodden*, 4 Bibb. 304; *Scott v. Scott*, 2 A. K. Marsh. 217; *Chancellor v. Wiggins*, 4 B. Mon. 201; *Huntingdon v. Hall*, 36 Me. 501; *Hale v. Smith*, 6 Greenl. 420; *Eldridge v. Wadleigh*, 3 Fairf. 372; *Butler v. Tufts*, 13 Me. 302; *Rice v. Forsyth*, 41 Md. 389; *Mockbee v. Gardner*, 2 Har. & Gill 176; *Whitney v. Heywood*, 6 Cush. 82, 86; *Bennett v. Bartlett*, 6 Id. 225; *Coolidge v. Brigham*, 1 Met. 551; *Dorr v. Fisher*, 1 Cush. 273; *Emerson v. Brigham*, 10 Mass. 202; *Hunt v. Sackett*, 31 Mich. 18; *Storm v. Smith*, 43 Miss. 497; *Dryden v. Kellogg*, 2 Mo. App. 87; *Sargent v. Currier*, 49 N. H. 310; *Bechet v. Smithers*, 50 N. Y. Super. Ct. 381; *Vibbard v. Johnson*, 19 Johns. 78; *Cuse v. Hall*, 24 Wend. 102; *Burt v. Dewey*, 40 N. Y. 283; *McCoy v. Archer*, 3 Barb. 323; *Heermance v. Vernoy*, 6 Johns. 5; *Sweet v. Colgate*, 20 Id. 196;

Rew v. Barber, 3 Cowen 272; *McKnight v. Derlin*, 52 N. Y. 399, 401; *Hoe v. Sanborn*, 21 Id. 552, 556; *Colcock v. Goode*, 3 McCord 513; *Darst v. Brockway*, 11 Ohio 462; *Whitaker v. Eastwick*, 75 Penn. St. 229; *Gookin v. Graham*, 5 Humph. 484; *Roper v. Rowlett*, 7 Lea 320; *Putee v. Pelton*, 48 Vt. 182.

2. But there is no such implied warranty if the chattels are not in the possession of the vendor at the time of the sale: *Huntingdon v. Hall*, 36 Me. 501, 503; *Byrnside v. Burdette*, 15 W. Va. 702; see *Pratt v. Philbrook*, 33 Me. 23; *Emerson v. Brigham*, 10 Mass. 202; *Long v. Hickingbottom*, 28 Miss. 772; *Scranton v. Clark*, 39 N. Y. 220; *McCoy Archer*, 3 Barb. 323; *Dresser v. Ainsworth*, 9 Id. 619; *Edick v. Crim*, 10 Id. 445; *Andres v. Lee*, 1 Dev. & Bat. Eq. 318; cases cited above.

3. And one who sells a chattel in a particular capacity does not implicitly warrant the title thereto. A warranty is implied only "if the vendor sells them as his own:" 2 Bl. Com. 451. Not if he sells "as agent for another:" 2 Kent Com. 478; *Hopkins v. Grinnell*, 28 Barb. 533, 537, as Story puts it, "So, also, the character in which the vendor sells may perhaps, prevent this implication of warranty—as if he be a pawnbroker, or officer of the law, or occupy any known position in which he does not pretend to be an owner or to assume personal responsibilities:" Story Sales, § 367 a, or to quote Addison: "Whenever a man does not sell as owner, but in some special character or capacity, and the purchaser has notice thereof, he is bound to look into the title of his vendor; for there is not, under such circumstances, any implied warranty of title on the part of the vendor:" 2 Add. Cont. 972 (Abb. ed. 503). To the same effect, Bateman: "By a sale of goods there is in general, an implied warranty of title, and the vendor cannot recover the price from the purchaser if the latter has been obliged to deliver them to a

third party on account of the vendor's want of title, unless it appear from the circumstances of the sale that the vendor did not intend to assert ownership; as where he sold in a particular capacity, for instance, as auctioneer, sheriff, pawnbroker, &c." Auctions 193. To the same effect see 1 Pars. Cont. 573; 1 Leake Cont. 109, 402; 1 Whart. Cont. § 230; 2 Schouler's Pers. Prop. 383 (Bailee).

Thus, there is no implied warranty of title in the case of a sale by one avowedly as Administrator or Executor: *Mockbee v. Gardner*, 2 Har. & G. 176, 177; *Ricks v. Dillahunty*, 8 Port. (Ala.) 134, 137; *Bingham v. Maxcy*, 15 Ill. 295, 296; *Sheppard v. Earles*, 20 N. Y. Supr. 651, 653; *Prescott v. Holmes*, 7 Rich. Eq. 9, 14; *Thompson v. Munger*, 15 Tex. 523, 527—Trustee: *Mockbee v. Gardner*, *supra*; *Worthy v. Johnson*, 8 Ga. 236, 241; *Storm v. Smith*, 43 Miss. 497, 501—Mortgagee: *Harris v. Lynn*, 25 Kan. 281, 285; *Shepherd v. Earles*, *supra*—Bailee (pawnbroker): *Morley v. Attenborough*, 3 Exch. 500; *Sims v. Marryat*, 17 Q. B. 280, 289—Judicial Officer: *Brown v. Wallace*, 2 Bland 585, 589; *Worthy v. Johnson*, *supra*—Tax Collector: *Hamilton v. Valiant*, 30 Md. 139, 140; *Freeman v. Caldwell*, 10 Watts 9, 10—United States Marshal: *The Monte Allegre*, 9 Wheat. 616, 645—Sheriff: *Morgan v. Fencer*, 1 Blackf. 10, 11; *State v. Prime*, 54 Ind. 450, 459; *Rogers v. Smith*, 2 Cart. (Ind.) 526, 527; *Neal v. Gillaspay*, 56 Ind. 451, 453; *Brunner v. Brennan*, 49 Id. 98, 100; *Harrison v. Shanks*, 13 Bush 620, 621; *Hensley v. Baker*, 10 Mo. 157, 158; *Bashore v. Whisler*, 3 Watts 490, 493; *Yates v. Bond*, 2 McCord 382, 383; *Sons v. Painter*, 5 Munf. 287, 291—Constable: *Bartholomew v. Warner*, 33 Conn. 92, 102—Master (of vessel): *Page v. Cowaskee*, L. R., 1 P. C. App. 137, 144—Agent: *Irwin v. Thompson*, 27 Kan. 643, 648, 649; *Hopkins v. Grinnell*, 28 Barb. 533, 537—Broker:

Fisher v. Reiman, 12 Md. 497 (1858); *Baxter v. Duren*, 29 Me. 434—Auctioneer; *Bateman* (Auctions) 193; *Biddle* (Warranties) § 261; *Schell v. Stephens*, 50 Mo. 375, 379; *The Monte Allegre*, 9 Wheat. 616.

4. The proposition "that one who acts in a particular capacity does not impliedly warrant the title to chattels he sells," does not conflict with the rule, "that one who acts in his own name binds himself personally." An illustration will clearly show this. Thus, nothing is better settled than that a trustee or administrator who makes a contract is personally bound, though he describe himself as "trustee" or "administrator:" *Gill v. Carmine*, 55 Md. 339, 342. And yet it is equally well settled that one who sells "as trustee," does not impliedly warrant the title: *Mockbee v. Gardner*, *supra*; and other cases, *supra*. The reason for this is plain. The party who makes the contract is personally bound only on its essential obligations; and, to quote Benjamin, "a warranty in a sale of goods is not one of essential elements of the contract, for a sale is none the less complete and perfect in the absence of a warranty; but it is a collateral undertaking, forming part of the contract by the agreement of the parties, express or implied:" *Benj. Sales*, 2d ed., § 610. See *Osborn v. Gante*, 60 N. Y. 540; and citations, *ante*, I.

Any one who, at a sale, states "I do not pretend to own these goods—the title is not in me," sells without warranty, yet he is personally bound by the sale. And so one who says, "I sell as trustee" or "as agent," may be personally bound by the sale, although by disclaiming ownership he prevents a warranty of title from arising. Therefore, authorities like *Franklin v. Lamond*, 4 C. B. 637, and *Mills v. Hunt*, 20 Wend. 431, 17 Id. 333, which decide that an auctioneer is personally liable for the performance of the contract of sale, have no bearing, whatever, on this point.

Cochrane v. Rymill, 40 L. T. (N. S.) 744, and *Hoffman v. Carew*, 20 Wend. 21, are cases in which it is held that an auctioneer selling as such, is liable in trover if he has no right to sell. The same rule would apply to a trustee or any one else. In *Williams v. Millington*, 1 H. Black. 81, it is held that an auctioneer may sue for the price of goods sold by him for an avowed principal. In

Hanson v. Robardeau, Peake's N. S. C. 121; *Franklin v. Lamond*, *supra*; *Jones v. Littledale*, 6 Ad. & El. 486; *Mills v. Hunt*, *supra*, it is held that an auctioneer who sells goods is bound to deliver them. In none of these cases is the question of an implied warranty of title in any way involved.

DAVID STEWART.

Baltimore.

Supreme Court of Indiana.

HADLOCK v. GRAY.

A conveyance to husband and wife, without words of limitation, renders them tenants by entireties.

Such an estate may be limited to a life estate, and words clearly expressing an intention to create an estate for their joint lives, and providing that after the termination of such life-estate, the land shall be divided among the heirs of the husband and the heirs of the wife, creates a life estate in the husband and wife.

Land was conveyed to husband and wife, and it was provided in the deed that after the decease of the husband and wife, the land should be equally divided between the heirs of the husband and the heirs of the wife; and if the husband died before the wife, she should hold the property until her death; or if the wife died first, he should hold the land until his death, and at the death of both of them, it should be divided as previously stated: *Held*, that the husband and wife were not tenants by entireties; that the first taker did not take the estate in fee under the rule in *Shelley's Case*; but the word "heirs" as used in the deed, meant heir apparent, and did not designate those persons who were to take in indefinite succession.

APPEAL from Fulton Circuit Court.

Essick and Montgomery, for appellants.

S. Keith and J. S. Slick, for appellee.

The opinion of the court was delivered by

ELLIOTT, J.—The appellee alleges in his complaint that he is the owner of the real estate therein described, and that his title rests upon a deed executed to him in January 1878, by Isaac Cannon, who has since died; that Isaac Cannon's title was founded upon a deed executed to him and his wife, Mary Cannon, by Charles Jackson and wife, on the twentieth day of April 1876; that this deed, omitting the formal parts, reads thus: "This indenture witnesseth

that Charles Jackson and Catharine Jackson his wife, of Fulton county, in the state of Indiana, convey and warrant to Isaac Cannon and Mary Cannon, for the sum of \$1200, the following real estate in Fulton county, Indiana, to wit: lot number one hundred and eighty-two, as designated on the plot of Shryock's and Bozarth's addition to the town of Rochester, with all the appurtenances thereunto belonging—the said Isaac Cannon to pay all taxes thereon from the day of sale. After the decease of said Isaac and Mary Cannon, the said property to be equally divided between the heirs of said Isaac Cannon and the heirs of Mary Cannon. If said Isaac Cannon shall die before his wife, she is to hold the said property until her death; and provided Mary Cannon shall die first, then Isaac Cannon is to hold said property until his death, and at the death of both it is to be divided as above stated."

It is also alleged that both Isaac and Mary Cannon are dead; that the deed of the former was made after the death of his wife; that the appellants are the children and grandchildren of Isaac and Mary Cannon; that they claim title to the real estate; that they have in fact no title, and that the appellee is entitled to a decree quieting his title. The prayer is, that the appellee's title be quieted and that the appellants be decreed to have no interest in the real estate.

The controlling question in the case turns upon the effect to be given the deed executed to Isaac and Mary Cannon. If that deed vested a fee in them as tenants in entirety, then the judgment below was right, if it vested in them a life-estate for the lives of both, then the judgment is wrong. Our opinion is that the deed vested in them a life-estate and nothing more. It is true, that where real property is conveyed to husband and wife jointly, and there are no limiting words in the deed, they will take the estate as tenants in entirety: *Davis v. Clark*, 26 Ind. 424; *Dodge v. Kinzy*, 101 Id. 102, *vide*, authorities cited page 105.

But while the general rule is as we have stated it, there may be conditions, limitations and stipulations in the deed conveying the property which will defeat the operation of the rule. The denial of this proposition involves the affirmation of the proposition that a grantor is powerless to limit or define the estate which he grants, and this would conflict with the fundamental principle that a grantor may, for himself, determine what estate he will grant. To deny this right would be to deny to parties the right to make their own con-

tracts. It seems quite clear, upon principle, that a grantor and his grantees may limit and define the estate granted by the one, and accepted by the others. Although the grantees may be husband and wife, Washburne says, in speaking of conveyances to husband and wife that, "it is always competent to make husband and wife tenants in common by proper words in the deed or devise which they take, indicating such intention:" 1 Wash. Real. Prop. 674. Another author says, "And furthermore, if at any time a joint tenancy or tenancy in common is desired to be created between man and wife, a joint estate will be treated as such, if that intention is clearly expressed in the deed or will:" Fred. Real Prop. § 244. The principle which we have asserted is thus declared by an author whose work for more than half a century has been regarded as authority, "In point of fact and agreeable to natural reason, the husband and wife are distinct and individual persons; and accordingly, when lands are granted to them as tenants in common, thereby treating them without any respect to their social union, they will hold by moieties as other distinct and individual persons would do:" 1 Prest. Estate 132.

The language employed in the deed under examination, plainly declares that Isaac and Mary Cannon are not to take as tenants in entirety. This result would follow from the provision destroying the survivorship, for this is the grand and essential characteristic of such a tenancy. Our conclusion need not, however, be placed on this ground, for the whole force of the language employed is opposed to the theory that the deed creates an estate in fee in the husband and wife. The deed does not contain the language essential to vest in the first taker an estate in fee under the rule in *Shelley's Case*. There are no words in the deed conveying to Isaac and Mary Cannon, and their heirs, the estate. On the contrary, the conveyance is to them for their joint lives, with the provision that upon the termination of the life-estate, the land shall be divided among their heirs. When the word "heirs" is used, as it is in this instance, it does not designate those who shall take an indefinite succession, but it designates persons who shall take the remainder as soon as the life estate ends. When that word is employed in the sense in which it is here used, it means "heirs apparent," and not "heirs." We have, in recent cases, given this question careful consideration, and we do not deem it necessary to again discuss it: *Fountain Coal Co. v. Beckleheimer*, 102 Ind. 76; s. c. 1 N. E.

Rep. 202; *Shimer v. Mann*, 99 Ind. 190, *vide* authorized p. 198. There is no reason why the clearly-expressed intention of the parties to the deed should not prevail, for neither the rule in *Shelley's Case*, nor any other rule of law, opposes the way of the court to a natural and reasonable construction of the deed; and surely no one who reads the deed can doubt that it was intended to vest a life-estate and not a fee in Isaac Cannon and his wife. What we have said disposes of the whole case: for it is impossible that a valid judgment can rest on complaint utterly and irreclaimably bad.

Judgment reversed, with instructions to sustain the demurrer to the complaint, and to proceed in accordance with this opinion.

The question presented in the principal case is an unusual one. A tenancy by entireties occurs whenever an estate vests in two persons, they being, when it so vests, husband and wife. It is not necessary that they should be married when the grant, gift or devise is made, or descent cast, but only when the estate vests. Thus, if they marry before the death of a testator and after the execution of his will; or if a feoffment is made to them while single, but livery of seisin does not take place until after their marriage; or if they, after marriage, recover on a voucher of warranty annexed to an estate of which they are joint-tenants before such marriage, in all these cases they take by entireties: *Jickling Anal. L. & Eq. Estates* 252; *Co. Litt.* 187; *Nicholls v. Nicholls*, cited in *Vin. Abr. Baron & Feme*; *Plowd. Com.* 483; *Freeman on Co-tenancy*, sect. 63; 2 *Black. Com.* 182; 2 *Preston on Abstracts* 39; 1 *Preston Est.* 131; *Gillan v. Dixon*, 65 *Penn. St.* 395.

In joint estates there are four requisites, viz.: unity of interest, unity of title, unity of time and unity of possession: 2 *Black. Com.* 357. But an additional requisite is necessary in a tenancy by entireties, viz.: but two persons can hold it, and they must be husband and wife at the time the estate vests: while any number can be joint-tenants: *Toppling v. Sadler*, 5 *Jones (N. C.) L.* 357. Each has the entire estate, and are not

seised by moieties. "They are seised, not *per my et per tout*, but solely and simply *per tout*." *Derr v. Hardenburgh*, 5 *Halst. (N. J.)* 42; s. c. 18 *Am. Dec.* 371. It has been said that the husband and wife "take but one estate as a corporation would take, being by the common law deemed but one person:" *Taul v. Campbell*, 7 *Yerg.* 319; s. c. 27 *Am. Dec.* 508. See *Stuckey v. Keefe's Exrs.*, 26 *Penn. St.* 399.

In an early case, a conveyance to husband and wife conveyed the estate "to them and their heirs." The husband was attainted of treason and executed, his wife surviving him. The king thereupon granted the land to a third person and his heirs. In a petition to the king the widow disclosed the entire matter; and upon *scire facias* against the king's patentee, recovered the lands: 1 *Inst.* 187, a; 1 *Greenl. Crim.* 841.

The principle underlying this case has been frequently followed in England and America. In the case just referred to, the wife, at the death of her husband, became instantly seised of the estate, to the exclusion of the king and her husband's heirs. We cite a few cases from different states: *Bach v. Andrews*, 2 *Vern.* 120; s. c. *Prec. Ch.* 1; *Doe v. Wilson*, 21 *B. & A.* 303; *Comm. v. Kennedy*, 111 *Mass.* 211; *Thornton v. Thornton*, 3 *Rand.* 179; *Suckey v. Keefe*, 26 *Penn. St.* 399; *Gibson v. Zimmerman*, 12 *Mo.* 385; *Lux v. Hoff*, 47 *Ill.* 427;

Davis v. Clark, 26 Ind. 424; *Hulet v. Inton*, 57 Ind. 412; s. c. 26 Am. Rep. 64; *Doe v. Garrison*, 1 Dana 45; *Harding v. Springer*, 14 Me. 407; *Fisher v. Provin*, 25 Mich. 347; *Duff v. Beauchamp*, 50 Miss. 531; *Hemingway v. Scales*, 42 Miss. 1; s. c. 2 Am. Rep. 586; *Woodford v. Higly*, 1 Winst. 237; *Wright v. Sadler*, 20 N. Y. 320; *Thomas v. DeBaum*, 1 McCarter Ch. 40; *Ames v. Norman*, 4 Sneed 692; *Brownson v. Hull*, 16 Vt. 309; *Ketchum v. Wolsworth*, 5 Wis. 95; *Robinson v. Eagle*, 29 Ark. 202.

Statutes abolishing joint tenancies do not affect a tenancy by entireties thereafter created; and a statute providing that if real estate is conveyed to two or more they shall hold it as tenants in common, unless otherwise expressed in the instrument of conveyance, does not render husband and wife tenants in common of estates conveyed to them while the statute is in force: *In re Shover*, 31 Q. B. (U. C.) 605; *Doe v. Hardenbergh*, 5 Halst. 42; s. c. 18 Amer. Dec. 371; *Shaw v. Hearsey*, 5 Mass. 521; *Jackson v. Stevens*, 16 Johns. 115; *Thornton v. Thornton*, 3 Rand. 179; *Hemingway v. Scales*, 42 Miss. 1; s. c. 2 Am. Rep. 586; *McCurdy v. Canning*, 64 Penn. St. 39.

In Connecticut and Ohio joint tenancies do not exist; and reasoning from this, the courts refuse to recognise tenancies by entirety—a wrong conclusion: *Whittlesey v. Fuller*, 14 Conn. 340; *Sergeant v. Steinberger*, 2 Ohio 305; *Wilson v. Fleming*, 13 Id. 68; *Penn v. Cox*, 16 Id. 30. See *Sloan v. Frothingham*, 72 Ala. 589, and *Bradley v. Love*, 60 Tex. 472.

If real estate is conveyed to husband and wife and a third person, they take one moiety and he the other: Litt., sect. 291; *Doe v. Hardenbergh*, 5 Halst. 42; s. c. 18 Amer. Dec. 371; *Doe v. Wilson*, 4 B. & A. 303; *Barber v. Harris*, 15 Wend. 615; *Back v. Andrew*, 2 Vern. 120; *Bricker v. Whatley*, 1 Id. 233;

In re Wylde, 2 D., M. & G. 724; and the same is true in case of legacies: *Gordon v. Whieldon*, 18 L. J. Rep. (N. S.) Ch. 5; *Atcheson v. Atcheson*, 18 L. J. Rep. (N. S.) Ch. 230; s. c. 11 Beav. 485; see *Johnson v. Hart*, 6 W. & S. 919; s. c. 40 Amer. Dec. 565; *Warrington v. Warrington*, 12 Hare 56.

If lands vest in a woman and man before they marry, after marriage they hold it either as tenants in common or as joint-tenants: *Moody v. Moody*, Amb. 649; *Bevins v. Cline*, 21 Ind. 37; *Chandler v. Cheney*, 37 Id. 391.

In an old case it was said, that "the same words of conveyance which would make two other persons joint-tenants, will make a husband and wife tenants by the entirety, so that neither can sever the jointure, but the whole must accrue to the survivor:" *Green v. King*, 2 W. Bla. 1213. See also, *Martin v. Jackson*, 27 Penn. St. 504; *Doe v. Parratt*, 5 T. R. 652; *Farmers' Bank v. Gregory*, 49 Barb. 155; *Doe v. Hardenbergh*, 5 Halst. 45; s. c. 18 Amer. Dec. 371; *Goeld v. Gori*, 31 Barb. 314, for like statements. A conveyance or devise 'to them,' naming them, creates such a tenancy: *Hamm v. Weisenheller*, 9 Watts 359. But a conveyance made to husband and wife at her request, has been held a conveyance to her, because, it was held, it would be presumed she acted under coercion: *Moore v. Moore*, 12 B. Mon. 664; *Babbitt v. Scroggin*, 1 Dur. 273. It is not necessary to name the grantees as husband and wife: *Chandler v. Cheney*, 37 Ind. 391; see 1 Wash. Real Prop. 577.

But a conveyance to Celestine Beal and John Beal, to be held by Celestine, "as her own property, John having the possession of the same during his lifetime; the possession to return to Celestine if she survives John," and both to pay taxes then due, was held to vest in her the title in fee subject to his life-estate only if he survives her: *Edwards v. Beale*, 75 Ind. 401.

The principal case is one of the few that recognise the doctrine that husband and wife may take an estate as joint tenants or tenants in common. This has been a mooted question; there are dicta that they can only take an estate as tenants by entireties: *Green v. King*, 2 W. Bla. 121; *Rogers v. Benson*, 5 Johns. Ch. 477; *Jackson v. Stevens*, 16 Johns. 115; *Barber v. Harris*, 15 Wend. 617; and there are cases that though a bond be conveyed to them as tenants in common, they hold it as tenants by entireties, because there is "a legal incapacity to take in severalty, arising from a legal identity; and a grantor cannot remove that incapacity without the intervention of a trustee:" *Dias v. Glover*, 1 Hoff. Ch. 76. To same effect: *Stuckey v. Keefe*, 26 Penn. St. 400; *Pollock v. Kelley*, 6 Irish L. R. (N. S.) 373. In the Pennsylvania case it is said, and this is the basis of the decision, that during coverture, husband and wife cannot hold or enjoy any other estate; yet this is manifestly incorrect, for if they are tenants in common, or even joint tenants before marriage, their coverture does not change the nature of the estate, and they still continue to hold the estate in the same way. See *McDermott v. French*, 15 N. J. Eq. 89. So if a co-tenant of the husband convey his interest to the husband's wife, she becomes a tenant in common with her husband: *Moore v. Moore*, 47 N. Y. 467.

Preston adopts the rule that they can hold otherwise than as tenants by entireties, although he is inclined to somewhat modify the rule as quoted in the principal case; see 2 Abstracts of Title 41. Where a deed was made to husband and wife, "the one equal half part to each," it was held to make them tenants in common: *Hicks v. Cochran*, 4 Edw. Ch. 110. So where the husband attempted to sell his interest, and the purchaser brought a partition suit against the wife, alleging that they held as tenants in common, a demurrer to the bill was overruled:

McDermott v. French, 15 N. J. Eq. 80. There are dicta also that husband and wife may hold as joint tenants or in common: *Chandler v. Cheney*, 77 Ind. 391; *Murbury v. Cole*, 49 Id. 402; s. c. 33 Amer. Rep. 266.

If the husband has no control over the wife's separate estate, he cannot exclude her from the enjoyment of an estate held by them as tenants by entireties; he cannot lease it, nor sell it without her consent: *Bevine v. Cline*, 21 Ind. 37; *Arnold v. Arnold*, 30 Id. 305. If a statute prohibit her going his security, then she cannot bind the estate by joining with him in a mortgage to secure the payment of his debt. Such a mortgage is a nullity: *Dodge v. Kinzy*, 101 Ind. 102; s. c. 18 Cent. Law Jour. 173.

His conviction of treason does not work a forfeiture of the estate, although it does of his separate estate: *Washburn v. Burns*, 34 N. J. L. 19; *Beaumont's Case*, 9 Rep. 140, k; Co. Litt. 147, a.

At common law the husband has the right to take possession of his wife's separate estate; or, as it has been said, he acquires by marriage, "during coverture, the usufruct of all the real estate which his wife has, in fee simple, fee tail, or for life." This statement of the law has been applied to tenancies by entireties; and during his life, or during coverture, at least, he may dispose of the estate, mortgage it, or lease it; but the exercise of such power, beyond his life, if his wife survive him, will be a nullity: *Taul v. Campbell*, 7 Yerg. 319; s. c. 27 Am. Dec. 508; *Ames v. Norman*, 4 Sneed 683; *Den v. Gardner*, 1 Spencer (N. J.) 556; s. c. 45 Am. Dec. 388; *Barber v. Harris*, 15 Wend. 615; *Jackson v. McConnell*, 19 Id. 175; s. c. 32 Am. Dec. 439; *Jones v. Patterson*, 11 Barb. 572; *Beach v. Hollister*, 3 Hun 519; *Meekes v. Wright*, 11 Id. 533; *Farmer v. Gregory*, 49 Barb. 155; *Torrey v. Torrey*, 14 N. Y. 430; *McCurdy v. Canning*, 64 Penn. St. 40; *Bennett v. Child*, 19 Wis. 765; *Bates v. Dandy*, 2

Atk. 207; *Watts v. Thomas*, 2 P. Wms. 384; *Draper v. Jackson*, 16 Mass. 486.

If the husband, without her consent, contracts for the building of a house upon the real estate, a mechanic's lien for building the house is good for his life, but no longer if she survive him: *Washburn v. Burns*, 34 N. J. L. 19. Both may mortgage it, even to secure the husband's debt, if no statute prohibits her becoming his security: *Dodge v. Kinzy*, *supra*; it is a valid mortgage: *McDuff v. Beauthorp*, 50 Miss. 531; and if either die, the mortgage is still good: *Berrigan v. Fleming*, 2 Lea 271.

So if the husband may mortgage or sell it for his life, it may be sold on execution against him; *Ames v. Norman*, 4 Sneed 692; *Taul v. Campbell*, 7 Yerg. 319; s. c. 27 Am. Dec. 508; *Bennett v. Child*, 19 Wis. 362; *Brown v. Gale*, 5 N. H. 416; *French v. Mehan*, 56 Penn. St. 289; *Brownson v. Hull*, 16 Vt. 309.

But where he cannot sell or mortgage the estate for his life, there are authorities which hold a sale of it on execution as utterly void: *Thomas v. De Baum*, 14 N. J. Eq. 37; *Jackson v. McConnell*, 19 Wend. 178; *Almond v. Bonnell*, 76 Ill. 536; *Chandler v. Cheney*, 37 Ind. 391, 408; *Bevine v. Cline*, 21 Id. 37; *Simpson v. Pearson*, 31 Id. 1; *Falls v. Hawthorn*, 30 Id. 444; *Hulet v. Inlow*, 57 Id. 412; *Davis v. Clark*, 26 Id. 454; *Kife v. Kife*, 33 N. Y. Eq. 213; *Curtis v. Gooding*, 97 Ind. 45; *Barren Creek Ditching Co. v. Beck*, 99 Id. 247; *Bartles v. Nunen*, 97 N. Y. 152; *Zornlein v. Bram*, 2 N. E. Rep. 388.

A crop raised upon the land held by them, as such tenant, cannot be sold (unless the law gives him possession of the land) on an execution against him alone; nor on one against her alone: *Putton v. Rankin*, 68 Ind. 245.

In such an estate there can be no partition, because husband and wife are one in law: *Chandler v. Cheney*, 37 Ind. 391; *Strawn v. Strawn*, 50 Ill. 33;

Cooper v. Cooper, 76 Id. 57; *Harrer v. Wallner*, 80 Id. 196; but when divorced they become tenants in common or joint tenants, and partition may then be had: *Ames v. Norman*, 4 Sneed 696; *Harrer v. Wallner*, 80 Ill. 197; *Lash v. Lash*, 58 Ind. 526; 2 Bright on Husband and Wife 365. But it was said that if the husband has alienated such property during coverture, the alienee takes a title not dependent on a continuance of the marital relations; and that the wife, after the divorce is granted, is not entitled to the possession of her moiety from her husband's grantee. The purchase "not made in view of the contingency" of the wife's divorce, cannot be affected by it: *Ames v. Norman*, 4 Sneed 696.

Where a wife endeavored to exchange her real estate for other real estate, under the agreement that the title to that received should be taken in her name, and, without her knowledge or consent the title was taken in the name of the husband, and the real estate so received was exchanged by the husband and wife, with money belonging to the husband, for other real estate, the title to which was taken in their names jointly; the real estate last transferred by them, it was held, was not the property of the husband, in considering the question whether or not the title to the real estate for which it was exchanged was taken in the name of the husband and wife for the purpose of defrauding creditors of the husband: *McConnell v. Martin*, 52 Ind. 534.

Where dower existed, a wife joined in a deed of conveyance of land held by entireties, executed by her husband, in token of her release of dower, "and of her free consent thereto," without being named in the granting clause. It was held that her interest, on the death of the husband, was not destroyed by this deed: *Waler v. Coffin*, 13 Allen 213; *Strawn v. Strawn*, 50 Ill. 33. But if both are named in the deed as parties of the first part, and afterwards the parties of the first part are named as grantors, it is the

deed of both: *Thornton v. Exchange Bank*, 71 Mo. 221.

Upon the ground that the husband had control over the premises, a sale of liquor by the wife, where a statute prohibited a sale without license, and rendered the owner of the house, where the sale was made fineable upon proof of it, it was held, renders him liable to the fine: *Commonwealth v. Kennedy*, 119 Mass. 211.

Husband and wife may reserve a life-estate, and hold it as tenants by entireties: *Jones v. Potter*, 89 N. C. 220. If the deed is to them jointly, it cannot be shown by parol that they hold as tenants in common: *Jacobs v. Miller*, 50 Mich. 119: see *Myers v. Reed*, 17 Fed. Rep. 401.

The usual married woman's enabling acts do not abolish tenancies by entireties, simply because they enable a married woman to hold and control a separate estate: *Myers v. Reed*, 17 Fed. Rep. 401; *Bertler v. Noonan*, 92 N. Y. 162; s. c. 44 Am. Rep. 361; *Farmers' Bank v. Gregory*, 49 Barb. 155; *Beach v. Hollister*, 3 Hun 319; *Robinson v. Eagle*, 29 Ark. 202; *contra*, *Meeker v. Wright*, 76 N. Y. 262; *Matteson v. N. Y. Cent. Rd.*, 62 Barb. 373; *Feely v. Buckley*, 48 Hun 451; *Diver v. Diver*, 56 Penn. St. 106; *Hoffman v. Stigers*, 28 Ia. 307; *Clark v. Clark*, 56 N. H. 105; *Cooper v. Cooper*, 76 Ill. 57.

Upon the second point decided in the principal case we cite a few cases.

In *Fountain County Coal & Mining Co. v. Beckleheimer*, relied upon in the principal case, it was said that "words deliberately put into a deed, and put there for a purpose, are not to be lightly considered, or arbitrarily put aside. The words in the deed before us were deliberately written in the instrument, are there for a purpose, and are not without meaning. We can assign them a meaning without encroaching upon any rule of law, and, by doing this, can give just effect to the intention

of the grantor." Consequently a deed by the grantor to his daughter, in consideration of natural love and affection "which he bears to his daughter * * * and her present heirs," "to have and hold the same to the said daughter, and her present heirs, forever; the grantor, his heirs and assigns, covenanting with the grantee, her present heirs and assigns, that the title so conveyed is free, clear, and unincumbered," was held to convey to the daughter and her children an estate in common; that the words "her present heirs" meant heirs apparent of the grantee; and that they made out a *descriptio personarum*, and were words of purchase.

So a devise to the "lawful heirs of A.," when it appears in the will that he is living, is equivalent as a description to a devise to his next of kin, or to his children: *Simms v. Garrett*, 1 Dev. & Bat. 393. So a devise to "A. and his heirs now living" was held a good devise to A.'s children: *Goodright v. White*, 2 W. Bl. 1010. See *Hearne v. Horton*, 1 Denio 165; *James v. Richardson*, 1 Vent. 334; *Roberts v. Ogbourne*, 37 Ala. 175; *Powell v. Glenn*, 21 Id. 458.

So a devise to the testator's brother's "legal heirs," to his sister's "legal heirs," and to his brother-in-law's "legal heirs," "to be divided equally between each of the heirs above named after the decease of my wife," was held to refer to the children of the brothers, sisters and brother-in-law: *Vonnorsdall v. Van Deventer*, 51 Barb. 137; see *Blake v. Stone*, 27 Vt. 475 (a deed); *Prior v. Quackenbush*, 29 Ind. 475 (a deed).

But where lands were devised to M., until his youngest child became of age, "upon the happening of which event the fee simple of said lands shall then vest absolutely in the said M., and his heirs, and may by him or them be disposed of as he or they may judge best, for his or their interest;" it was held, that the devise vested in M. an estate in fee sim-

ple when his youngest child reached full age, with power in M., then to dispose of it as he saw fit; and if he did not dispose of it during his life, then his heirs could dispose of it absolutely; *Shimer v. Mann*, 99 Ind. 190. See *Schoonmaker v. Sheely*, 3 Denio 482; *Burchett v. Duadont*, 2 Vent. 311; *Darbison v. Beaumont*, 1 P. Wms. 229; *Jack v. Fetherson*, 9 Bligh. 237; *Poole v. Poole*, 3 B. & P. 620; *Teller v. Attwood*, 15 Q. B. 929; *Mills v. Seward*, 1 J. & H. 733; *Grimson v. Downing*, 4 Drew. 125; *Anderson v. Anderson*, 30 Beav. 209; *Moore v. Brooks*, 12 Gratt. 135; *Star Gloss Co. v. Morey*, 109 Mass. 570; *Scott v. Guernsey*, 48 N. Y. 106; *Urick's Appeal*, 86 Penn. St. 386; s. c. 27 Am. Rep. 707; *King v. Beck*, 15 Ohio 559; *Guthrie's Appeal*, 37 Penn. St. 9.

A devise of real estate by a testator to his son "during his natural life, and at his death to his children, if he have any, and if he have no children, or if there be no heirs of his body, then the real estate to his other heirs of his own blood, equally, and if he die leaving a wife, his said wife to have a life-estate in said real property, said estate to terminate at her death," was held, to vest in the son, unmarried and childless at the testator's death, only a life-estate: *Ridgway v. Lamphear*, 99 Ind. 251. See *Daniel v. Whartenby*, 17 Wall. 639; *Montgomery v. Montgomery*, 3 Jones & L. 46; *Webster v. Cooper*, 14 How. 488; *Powell v. Glenn*, 21 Ala. 458.

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LEGAL NOTES.

THE recent decision of the Supreme Court of the United States in the *Express Company Cases*¹ has been awaited with no little interest by the profession.

The three suits, presenting substantially the same questions, were heard together and argued by well known counsel. Each was brought by an express company against a railway company, to compel the latter to afford it the same express facilities it had formerly enjoyed under a contract then abrogated. The several Circuit Courts from which the cases were appealed, had each entered a decree in favor of the express companies, the material part of one of which, embodying the views entertained and the conclusions reached, is here given:

"(1) That the express business, as fully described and shown in the record, is a branch of the carrying trade, that has by the necessities of commerce and the usages of those engaged in transportation, become known and recognised so as to require the court to take notice of the same, as distinct from the ordinary transportation of the large mass of freight usually carried on steamboats and railroads.

"(2) That it has become the law and usage, and is one of the necessities of the express business, that the property confided to an express company for transportation should be kept while in transit in the immediate charge of the messenger or agent of such express company.

"(3) That to refuse permission to such messenger or agent to accompany such property on the steamboats or railroads on which it is to be carried, and to deny to him the right to the custody of the property while so carried, would be destructive of the express business, and of the

¹ *St. Louis, I. M. & S. Ry. Co. v. Southern Express Co.*; *Memphis & L. Rd. Co., as reorganized, v. Same*; *Missouri, K. & T. Ry. Co. v. Dinsmore, President of the Adams Express Co., &c.*

rights which the public have to the use of such steamboats and railroads for the transportation of such property so under the control of such messengers or agents.

"(4) That the defendant, its officers, agents, and servants, have no right to open or inspect any of the packages or express matter which may be offered to it for transportation by the plaintiff's company, or to demand a knowledge of the contents thereof, nor to refuse transportation thereof unless such inspection be granted or such knowledge be afforded.

"(5) That it is the duty of the defendant to carry the express matter of the plaintiff's company, and the messengers or agents in charge thereof, at a just and reasonable rate of compensation, and that such rate of compensation is to be found and established as a unit, and is to include as well the transportation of such messengers or agents as of the express matter in their custody and under their control.

"(7) That it is the duty of the defendant to afford to the plaintiff all express facilities, and to the same extent and upon the same trains that said defendant may accord to itself, or to any other company or corporation engaged in the conduct of an express business on the defendant's lines, and to afford the same facilities to the plaintiff on all its passenger trains.

"(8) That the plaintiff keep and render monthly a true account of the services performed for it by defendant, and pay therefor at the rate hereinafter specified, on or before the _____ of each month, after the date hereof, for the business of the month preceding; and that the defendant has no right to require prepayment for said express facilities, or payment therefor at the end of every train, or in any other manner than as is herein provided; and that plaintiff execute and deliver to the defendant a bond in the sum of twenty-five thousand dollars, conditioned well and faithfully to make such payments as are herein provided, and with surety to be approved by a judge of the court.

The Supreme Court, in the opinion delivered by Chief Justice WAITE, after reviewing the growth of the express business and recognising the fact that it could not be destroyed without interfering materially with business and the conveniences of social life, thus continues: "In this connection it is to be kept in mind that neither of the railroad companies involved in these suits is attempting to deprive the general public of the advantages of an express business over its road. The controversy, in each case, is not with the public, but with a single express company. And the real question is not whether the railroad companies are authorized by law to do an express business themselves; nor whether they must carry express matter for the public on their passenger trains, in the immediate charge of some person specially appointed for that purpose; nor whether they shall carry express freights for express companies as they carry like freights for the general public—but whether it is their duty to furnish the Adams Company or the Southern Company facilities for doing an express business upon their roads, the same in all respects as those they provide for themselves or afford to any other express company."

Admitting as true the averments in the bill, that "no railroad company in the United States * * * has ever refused to transport express matter for the public, upon the application of some express company, of some form of legal constitution. Every railway company * * * has recognised the right of the public to demand transportation by the railway facilities, which the public has permitted to be created, of that class of

matter which is known as express matter," the court says it is not there averred nor shown by the testimony that any railroad in the United States has ever held itself out as a common carrier of express companies, i. e., a common carrier of common carriers. Much stress is laid on the inconveniences that would follow, were the railroad companies obliged to furnish express facilities to all applying for them, its interference with passenger business, etc., and the conclusion is reached, that "The railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done, the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose. The public require the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security."

Failing to find any evidence of a usage to that effect, in the absence of any statute, the court declares that it is not the duty of railroad companies to furnish express facilities to all alike who demand them; and as no duty was imposed by contract upon the defendants to furnish the complainants with such, the court declines making a judicial regulation of their business.

The opinion is of value because of the decision reached, rather than for the discussion of the subject, which has been more elaborately treated in many other cases, a collection of which will be found in a note to *Southern Ex. Co. v. Nashville Ry. Co.*, 20 Am. L. Reg. 602.

The practical solution of the problem is not free from difficulty. The growing feeling against monopolies of every sort, will no doubt lead to attempts on the part of the various state legislatures to impose on the railway companies, the duty which it has just been decided is not theirs by the common law, and the complicated provisions, inseparable from such legislation, will no doubt give rise to many constitutional questions, akin to those we may expect from the Railroad Commission Acts.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF UNITED STATES.¹

SUPREME COURT OF GEORGIA.²

SUPREME COURT OF INDIANA.³

SUPREME COURT OF ILLINOIS.⁴

COURT OF ERRORS AND APPEALS OF MARYLAND.⁵

AGENT. See *Bank*.

Authority to Warrant—Presumption.—An agent, upon whom general authority to sell, is conferred, will be presumed to have authority to warrant, unless the contrary appears: *Talmage v. Bierhouse*, 103 Ind.

¹ Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term, 1885. The cases will probably appear in 116 U. S. Rep.

² From J. H. Lumpkin, Esq., Reporter; to appear in 73 or 74 Ga. Rep.

³ From John W. Kern, Esq., Reporter; to appear in 103 Ind. Rep.

⁴ From Hon. N. L. Freeman, Reporter; to appear in 114 Ill. Rep.

⁵ From J. Shaaf Stockett, Esq., Reporter; to appear in 64 Md. Rep.

It will be presumed, in the absence of a showing to the contrary, that a warranty is not an unusual incident to a sale by an agent for a dealer in a commodity, where the thing sold is not present and subject to the inspection of the purchaser : *Id.*

Though the authority of the agent be restricted by instructions from his principal, the latter will be bound by a warranty attending a sale by the agent, unless the purchaser knew of such restriction : *Id.*

ATTACHMENT. See *Bank.*

BANK.

Garnishment—Checks drawn before Service—Lien to secure Endorsements—Fraud—Conflict of Laws.—Where a depositor in a bank, before the service of process upon the bank as garnishee at the suit of a creditor of the deposit or, drew a check in favor of another, which was forwarded to the bank, and was by it paid in due course of business after the service of the writ, and charged to the account of the depositor, it was *held*, that the bank, as garnishee, was entitled to credit for the amount of the check so paid : *Bank of America v. Indiana Banking Co.*, 114 Ill.

But if a bank pays checks drawn on it after it is served with garnishee process, it cannot be allowed credit therefor as against the rights of creditors of the depositor, entitled to share in the funds garnished : *Id.*

Where a depositor indorsed a promissory note of a third person, made payable to his order, and discounted the same in a bank where he had funds to his credit, it was *held*, that a payment of the amount due on such note by the indorser, to the bank, out of his funds on deposit, after the service of garnishee process upon the bank at the suit of a creditor of such indorser, could not be allowed the bank as a set-off, the indorser's liability to the bank being that only of a surety, and contingent : *Id.*

If a depositor draws a check upon his banker, who has funds to an amount equal or greater, it operates to transfer the sum named in the check to the payee, who may sue for and recover the same in his own name : *Id.*

The fact that a check is drawn by a depositor of funds in a bank, in favor of the cashier of such bank, just previous to the service upon the bank, by garnishee process, is not of itself evidence of fraud or want of good faith. It is as lawful for an attachment debtor to draw his check in favor of the garnishee, as in favor of any one else, if done in good faith before the service of process, and the garnishee will be entitled to credit for the amount named in the check, in the absence of evidence impeaching the transaction for fraud : *Id.*

A check drawn by a depositor in the state of Indiana, on his banker, payable in this state, will be construed by the laws of this state, and operate to transfer the sum named therein in accordance with the laws of this state, notwithstanding a different rule obtains in the other state : *Id.*

Authority of Cashier—Note—Evidence—Notice.—In a suit against a firm of private bankers, upon a note given by their clerk and cashier for money borrowed by him in the firm name and appropriated to his own use, in which the cashier's authority to give the note is put in issue, evidence of the custom of bankers at the place in which the defendants'

bank was located, to borrow money on time, is proper, as tending to show that the borrowing of money was within the scope of the ordinary and customary business of the defendants: *Crain v. First Nat. Bank of Jacksonville*, 114 Ill.

In the same suit it was *held*, a paper, directed to another and distant bank, giving the signatures of persons authorized to sign for the defendants, one of which was in the handwriting of the cashier and another that of one of the defendants, was proper evidence as an admission of the defendant signing the same, of the cashier's authority to bind the defendants by the execution of a note in their firm name. And the fact that the payee of the note did not act on the faith of such paper, though detracting from its weight, did not render it irrelevant and improper: *Id.*

The giving as collateral security, by a cashier of a private bank, notes of other persons, of over \$5000, of his bank, to secure a note of that amount given by him in the name of his principals, with authority, on maturity of the latter notes, to sell the collaterals at public or private sale, with or without notice, and apply the proceeds to the payment of the note given, is not of such a nature as to afford notice to the party making the loan and taking the notes, of the cashier's want of authority to execute the note for the bank, or of fraud in giving it: *Id.*

General or Special Deposit of Money—Insolvency—Trust Funds.—Upon a special deposit of money, a bank is merely a bailee, and is bound according to the terms of the deposit; but on a general deposit the money becomes the property of the bank, and the depositor's claim on the bank is merely for a like amount: *McLain v. Wallace*, 103 Ind.

Upon the insolvency of a bank, its general depositors must be paid *pro rata*: *Id.*

The addition of the word "clerk" to the name of a general depositor does not make the deposit a special one, nor does it change the liability of the bank: *Id.*

The rule that a trustee may follow trust property as long as it can be traced, has no application in an action to recover money on general deposit in a bank: *Id.*

Contract of Cashier—Misappropriation of Funds—Notice.—A contract between the cashier of a bank and defendant, whereby defendant was to buy railroad stock for such cashier, was to give his note to the bank for it, and deposit the stock as collateral security for the payment of the same, and the cashier was to advance the money of the bank, to pay for the stock, was contrary to the rules of the bank, it amounted to a misappropriation of the bank's funds, for which both the cashier and defendant are liable: *Savannah Bank and Trust Co. v. Hartridge*, 73 or 74 Ga.

The knowledge of the cashier in such a transaction, was not the knowledge of the bank, and it was not bound thereby: *Id.*

Contract by President.—The president of a bank cannot make a valid contract between it and a third party, acting in the capacity of agent for such third party as well as for the bank: *English v. Bank of Georgia*, 73 or 74 Ga.

Where Coker, who was president of a bank, and English agreed with the bank, in writing, to become guarantors for the safe return of certain jewelry to the bank, by Sharpe, and by such return of the jewelry such

agreement became abrogated, it was not subsequently revived as against English, by a note of English to Coker, authorizing him to make any arrangement with Sharpe, for Coker and English, by which Sharpe might take the goods, which Coker might see proper to make, and an arrangement by which Sharpe was allowed by Coker to take the goods, giving a receipt to Coker and English therefor, and Coker bound himself verbally to the bank, to be jointly responsible with English for their safe return : *Id.*

BILLS AND NOTES.

Forbearance to Sue—Estoppel—Extension.—Where the holder of a promissory note gratuitously permits it to run more than a year after maturity, and then, upon the payment of a part of it by the maker, the holder, at the request of the maker, and without losing any right or changing his situation, agrees to wait until the latter can collect money with which to discharge the balance, such maker is not estopped to set up a defence then existing, or which might thereafter arise, of which neither such maker nor the holder, had notice at the time of such agreement : *Henry v. Gilliland*, 103 Ind.

To defeat the right to a clear defence to a note, not payable in bank, in the hands of an assignee, on the ground of a subsequent contract to pay in consideration of an extension of time, the plaintiff must show a contract of extension for a definite time, upon a valid consideration. Performance of his part is not sufficient to bind the maker : *Id.*

COMMON CARRIER.

Negligence.—Contract Limiting Liability—Fixing of Value.—A common carrier, may by contract, limit his liability as an insurer, but he can not thus relieve himself from the consequences of his own negligence or fraud : *Rosenfield v. Peoria, etc., Ry. Co.*, 103 Ind.

In order that a common carrier may, by fixing the value of goods received for transportation, limit his liability, he must show that the shipper had knowledge of such fixing of value and for a sufficient consideration consented thereto, or that his statements and conduct justified the carrier in so fixing the value : *Id.*

Contracts limiting the amount of recovery will be construed most strictly against the carrier. The burden is upon the carrier to show any claimed limitation upon its common-law liability : *Id.*

CONFLICT OF LAWS. See *Bank*.

CONSTITUTIONAL LAW. See *Telegraph*.

Regulation of Commerce.—Occupation Tax on Sale of Products of another State.—An act of a state legislature imposing a tax or duty on persons who, not having their principal place of business within the state, engage in the business of selling or of soliciting the sale of certain described liquors to be shipped into the state, is unconstitutional, as discriminating to the disadvantage of the products of other states, and in effect, a regulation of inter-state commerce : *Walling v. State of Michigan*, S. C. U. S., Oct. Term 1885.

CONTEMPT.

Service of an Order to Show Cause upon an Attorney of Record.—A New York corporation doing business in California, was required by the

law of that state to designate a person upon whom process may be served. A suit was commenced against the corporation, which duly appeared by its attorneys. An order was issued against it to show cause why it should not be punished for contempt in disobeying an *ex parte* restraining order issued immediately upon the bringing of the suit. The designated agent of the company purposely kept himself out of the way of the officer to avoid service of this order; and an order was entered that service be made upon "the attorneys of record herein of said defendant." *Held*, that such service was valid: *Eureka Lake Company v. Yuba County*, S. C. U. S., Oct. Term 1885.

CONTRACT.

Construction—Right of Buyer to pass upon Quality—Evidence.—A contract for the sawing, and delivery to the purchaser, of lumber, providing that he should measure the same when delivered, and that he should measure and pay for only such as was absolutely clear, and suitable for a certain purpose, while it gives the buyer the right to measure the lumber and pass upon its quality, does not make him the sole judge, and his decision beyond review. In such case, he is bound to receive and measure such of the lumber as complies with the contract, although in his judgment it is not of the proper quality: *Mulliner v. Bronson*, 114 Ill.

In a suit upon a contract for the sawing and delivery of lumber to the defendant at his yard in a city, containing a clause that defendant should measure the same after its delivery, and take only such as was absolutely clear and would work into tobacco boxes, there is no error in admitting the testimony of witnesses who saw the lumber after it was sawed, in the timber, and when it was being shipped, to show its quality when delivered. If injured while being shipped, such fact might be shown: *Id.*

CORPORATION.

Necessity of Acceptance of Charter within State creating it.—The mere granting of a charter, it not appearing upon the face of the incorporating act or otherwise, that the named corporators had applied for it, does not create a corporate body—there must be at least an acceptance of the grant by a majority of the corporators before its corporate life and existence can begin: *Smith v. Silver Valley Min. Co.*, 64 Md.

Where there is nothing in the charter which dispenses with the necessity of its acceptance, and of organization under it, by the corporators, and nothing which authorizes them, even if the grant of such authority would in any case be valid, to do those acts in another state, the charter will be held invalid in the absence of proof of acceptance: *Id.*

A charter can be accepted and the corporation organized only within the limits of the state creating it: and this rule should be applied and enforced, when a proper case for its application arises, in the tribunals of the state in which the unauthorized acts were done or the suit was instituted, as well as by the courts of the incorporating state: *Id.*

Conflict of Laws—Jurisdiction of Courts as to Controversies relating to Management.—The courts of Maryland will not interfere in controversies relating only to the internal management of the affairs of a foreign corporation. Such controversies must be settled by the courts of the state creating the corporation: *North State Copper and Gold Min. Co. v. Field*, 64 Md.

Where the act of a foreign corporation affects one solely in his capacity as a member of the corporation, such act may be said to relate to the management of the internal affairs of the corporation; but it is otherwise where it affects his individual rights only: *Id.*

Two Corporations using same Name—Injunction.—A bill by a domestic corporation incorporated by the name of "Drummond Tobacco Company," to enjoin the incorporation of another company in the same city by the name of "Drummond-Randle Tobacco Company," to engage in the same business, will not be sustained unless it is shown, by such a preponderance of evidence as to satisfy the mind of the chancellor, that the incorporation of the second company under the name proposed will injure the former company in its business: *Drummond Tobacco Co. v. Randle*, 114 Ill.

So the use of any particular name by a corporation will not be enjoined unless it is made to appear, from the evidence and by all the circumstances, the proposed use of the name will likely result in injury to the complainant: *Id.*

DAMAGES. See *United States Courts*.

EQUITY. See *Specific Performance*.

EVIDENCE.

Expert—Hypothetical Case.—Where a hypothetical case, covering the leading facts testified to, and practically admitted, is stated to a witness shown to be an expert, his opinion, based on such hypothetical case, is proper evidence: *Lotz v. Scott*, 123 Ind.

EXECUTOR AND ADMINISTRATOR.

Bequest for Life—Waste by Executor during Life-estate—Remedy for Remainderman.—Where money is bequeathed to one for life, with remainder to another, and the executor, or administrator with the will annexed, has wasted or converted it to his own use, the remainderman cannot sue the bond of such executor or administrator, during the lifetime of the tenant for life: *State v. Brown*, 64 Md.

The remedy for the remainderman in such case, is to apply to the Orphans' Court to order the executor to bring the money into court to be safely invested, so that the tenant for life may receive the interest during his life, and at his death the principal may be paid over to the remainderman: *Id.*

Upon the neglect or refusal of the executor to comply with such order the court will revoke his letters, and appoint an administrator *de bonis non*, with the will annexed, and direct him to bring suit on the testamentary bond of the recusant executor. Or the remainderman may proceed against such executor in a court of equity, and compel him to bring the money into court for investment: *Id.*

Right of one Executor to Maintain Bill against the Other.—An executor or administrator cannot file a bill in equity against his co-executor or co-administrator, in order to compel the latter to account for and pay over to him certain claims alleged to be due from the defendant as debtor to the estate of the deceased: *Whiting v. Whiting*, 64 Md.

FRAUD. See *Bank*.

FRAUDS, STATUTE OF.

Lease.—Consideration.—Where, as part of the consideration of the sale and transfer of a lease, for ten years, of real estate, the assignee agreed "to assume the covenants, and pay the rent agreed in said lease," such contract is not a promise to answer for the default of another, within the Statute of Frauds, but is an independent undertaking, founded upon a new and valuable consideration, for the benefit of a third person, and is valid: *Wolke v. Fleming*, 103 Ind.

INJUNCTION. See *Corporation*.

INSURANCE.

Assignment of Policy to Insurer as Collateral—Duty to pay Premiums—Failure to give customary notice—Unreasonable Delay of Insured.—It would be the duty of one insured to keep alive his policy, assigned as collateral security to the insuring company, by the payment of premiums, just as much as if it had been so assigned to any third person: *Grant v. Alabama Gold Life Ins. Co.*, 73 or 74 Ga.

While the custom and usage in dealings between one insured and the insuring company, such as in regard to personal notice to the insured by the agent of the company at Savannah of the time when premiums became due, become so much a part of the contract of insurance as to require the company to keep it up, or to give notice before substituting another mode, yet the insured must act with reasonable diligence, and six months' delay to pay a premium for want of notice appears so unreasonable as to show a purpose to abandon the policy and let it lapse: *Id.*

LEGACY.

Failure to put Property in Inventory—Rights of Legatee.—In an action of ejectment by legatees to recover leasehold property specifically bequeathed to them, it is not necessary to prove, in addition to the probate of the will, and the grant of letters testamentary, and the assent of the executor to the legacy, that the property was included in the inventory returned by the executor, and was distributed to the legatees by the order of the Orphans' Court: *Matthews v. Turner*, 64 Md.

The entire personal estate ought to be returned in the inventory to the Orphans' Court. But the title of a legatee to property specifically bequeathed, does not depend upon the inventory returned by the executor, nor does it necessarily depend upon the orders of the Orphans' Court: *Id.*

LIBEL.

False Statement in Affidavit for want of Arrest.—An action for libel cannot be sustained for false charges of a crime, in an affidavit for a warrant taken before a duly authorized and lawfully commissioned magistrate, having jurisdiction of the offence for which the warrant issues: *Francis v. Wood*, 73 or 74 Ga.

The only exception made is where an affidavit is sworn recklessly and maliciously before a court, that has no jurisdiction in the matter, and no power to entertain the proceedings: *Id.*

The libeller may be punished and the abuse repressed by a prosecution for perjury, the result of which is to make the libeller infamous if he is convicted : *Id.*

MASTER AND SERVANT.

Injury to Servant—Co-employees—Foreman.—Where a master delegates duties which the law imposes upon him to an agent, the latter, whatever his rank, in performing such duties acts as the master, and for an injury to an employee caused by the negligence of such agent, the master is liable : *Capper v. Louisville, &c., Ry. Co.*, 103 Ind.

A foreman, or other like agent, except where the master's duties are delegated to him, is a fellow servant with those under his immediate supervision, and for his negligence the master is not liable to a servant engaged in the same general service : *Id.*

One engaged in the work of constructing and repairing tunnels upon the line of a railroad, who is injured by being carried from one point to another upon the line of the road, is a fellow servant with the engineer and other persons in charge of the train : *Id.*

MINES AND MINING.

Following Veins outside of the lines of the Surface Location—Definition of "Vein, Lodge or Ledge."—The act of congress (Rev. Stat. § 2322) gives to the owner of a mineral vein or lode, not only all that is covered by the surface lines of his established claim, as those lines are extended vertically, but it gives him the right to possess and enjoy that lode or vein by following it when it passes outside of these vertical lines laterally : *Iron Silver Mining Co. v. Cheesman*, S. C. U. S., Oct. Term 1885.

The acts of congress use the words vein, lode or ledge, as embracing a more or less continuous body of mineral, lying within a well-defined boundary of other rock, in the mass within which it is found, or it may be said to be a body of mineral, or a mineral body of rock within defined boundaries in this general mass : *Id.*

A vein is by no means always a straight line, or of uniform dip or thickness, or richness of mineral matter, throughout its course. The cleft or fissure in which a vein is found may be narrowed or widened in its course, and even closed for a few feet and then found further on, and the mineral deposit may be diminished or totally suspended for a short distance, but if found again in the same course with the same mineral within that distance, its identity may be presumed : *Id.*

MUNICIPAL CORPORATION.

Nuisance—System of Drainage—Liability therefor—Though the city, by its charter, has the right to establish a system of grading and drainage, such grading and drainage must be done so that the same will not prove a nuisance to the citizens, impairing the health of families, etc., thereby rendering enjoyment of their property impossible ; otherwise the city will be liable for damages : *Smith v. City of Atlanta*, 73 or 73 Ga.

The sewer in question, though dug in 1870, was and is under the control of the city ; if it be a nuisance, the city has not abated it, no one else could, and not having abated it the city may be said to have maintained

it and kept it up, and it is thereby a continuing nuisance, for the maintenance of which the city is liable: *Id.*

Governmental Duties—Principal and Agent—Respondent Superior.—Where the duties delegated to officers elected by public corporations, are political or governmental, the relation of principal and agent does not exist, and the maxim of *respondent superior* does not govern: *Summers v. Board*, 103 Ind.

Counties are instrumentalities of government, and are not liable for injuries caused by the negligence of the commissioners in the selection of an unskilful or incompetent physician for the care of the poor: *Id.*

Nuisance—"Coasting" on a Street—Passing of Ordinance—Liability of Municipality.—By sect. 40, of the act of 1878, chap. 484, amending the charter of the city of Cumberland, it is provided that the city council "may pass ordinances to remove all nuisances and obstructions from the streets, lanes and alleys within the limits of the city;" and "for the preservation of peace and good order, securing persons and property from violence, danger or destruction." The city council, by ordinance, sect. 5, chap. 13, of the city code, prohibited, under the penalty of a fine, "any sport, play or exercise that might produce bodily injury, or endanger property on any street, square or alley within the city limits." In an action against the mayor and city council of Cumberland, to recover for injuries to the plaintiff, caused by his being knocked down, while crossing one of the streets of the city, by a sled on which a number of boys were coasting on the snow, it was held, 1st. That the defendant was under an obligation to exercise for the public good the powers conferred on it by its charter to prevent nuisances and to protect persons and property; and that this duty was not discharged by merely passing ordinances; a vigorous effort must be made to enforce them. 2d. That the defendant was bound to prevent the nuisance if it could do so by ordinary and reasonable care and diligence; but if it did use this degree of care and diligence, it discharged its duty, and was relieved from responsibility; and a vigorous effort to enforce its ordinance on the subject would fulfil its duty in this respect. 3d. That the question whether such effort was made was one to be determined by the jury: *Taylor v. Mayor, &c., of Cumberland*, 64 Md.

Negligence—Sidewalks—Notice.—It is the duty of a city to keep its streets and sidewalks in a reasonable safe condition, so that they may be passed over in safety both by day and by night, and for neglect in this particular the city would be liable: *Bellamy v. City of Atlanta*, 73 or 74 Ga.

If the defect causing an injury has existed for some time the city is chargeable with notice of it. If the city could have ascertained the defect its failure to do so is negligence, and its liability the same as if it had notice, and a charge that the defect must be open and notorious, etc., is error: *Id.*

NEGLIGENCE. See *Common Carrier; Master and Servant; Municipal Corporation; Railroad.*

Excavation causing Pitfall upon Adjoining Lot—Parent and Child—Contributory Negligence.—One who makes an excavation upon his lot in

such a manner as to cause a pitfall upon an adjoining lot is liable, in the absence of contributory negligence, to one who resides upon the latter, for the death of his child caused by falling into such pit: *Mayhew v. Burns*, 103 Ind.

Where one is suing for the death of his child alleged to have been caused by the negligence of another, evidence that the plaintiff is poor, and not able to employ any one other than his housekeeper to take care of his children, is not admissible upon the question of contributory negligence: *Id.*

Where one knows of danger which threatens injury to himself or those to whom he is bound to afford protection, and he can by reasonable exertion avert it, his negligent failure to do so will prevent a recovery: *Id.*

NUISANCE. See *Municipal Corporation*.

PARTNERSHIP. See *Receiver*.

Injunction—Receiver—Equity Practice.—Upon an application for a receiver of a partnership the court does not determine the questions arising between the partners; the only question for consideration being, whether, upon the facts disclosed, there is an apparent necessity for either an injunction, or a receiver, to protect the assets of the partnership until the rights of the partners can be definitely determined upon full hearing of the case: *Heflebower v. Buck*, 64 Md.

The question of the propriety of granting an injunction or of appointing a receiver, is not to be determined upon the allegations of the bill alone, but the averments of the answer are also to be considered: *Id.*

The interest of the defendants, as well as that of the complainant, must be considered in an application of this kind; and where it is manifest that to grant the injunction and appoint a receiver as prayed, at that stage of the settlement of the affairs of the partnership then nearly at the close, would be attended with no substantial good to any of the parties concerned, but would likely be attended with unnecessary trouble, perplexity and expense, if not with even more serious mischief to the real interests involved, the application will be denied: *Id.*

In such a case there must be some clear breach of duty, or conduct amounting to fraud, or the facts must be such as to show a real danger to the partnership assets thus confided to the administration of the settling partner, by reason of insolvency or otherwise: *Id.*

PRACTICE.

Trial by the Court without a Jury—Effect of a Stipulation as to what was Proven.—Under the stipulation in writing of the parties a case was tried by a circuit court without a jury. The court entered a judgment finding certain facts, and, as a conclusion of law, the issues joined for defendant. On the same day a stipulation was filed, signed by the attorneys for the parties, by which it was agreed that on the trial certain facts were "proved." *Held*, That the stipulation did not contain any agreement as to the existence of any facts, but merely a statement as to what the proof showed on the trial; and therefore as to any facts stated in the stipulation to have been shown by proof at the trial, if they were not contained in the special findings, the only conclusion could be that the court did not find them to be facts; and that the case must be adjudicated on the special findings alone: *Tyre & Spring Works Co. v. Spaulding*, S. C. U. S., Oct. Term 1885.

RAILROAD. See *Common Carrier*.

Negligence—Sparks from Locomotive—Evidence—An action was brought against a railroad company to recover damages resulting from a fire alleged to have been occasioned by the engines and locomotives of the defendant being negligently run and controlled on the line of its road. The plaintiff offered only indirect proof that the fire was caused by the engine of the defendant. The defendant then offered to prove that among the farmers in that region it was a custom or usage to set fire to the leaves and underbrush at that season, so as to improve the pasture; and that annually, during many years before the defendant's road was built, such fires had been started in that valley and the adjacent mountains. *Held*, That the evidence was inadmissible: *Green Ridge Co. v. Brinkman*, 64 Md.

Where a railroad company is sued for damages resulting from a fire communicated by the defendant's engine, proof that the fire so originated creates the presumption of negligence, and the *onus probandi* is on the defendant to show the contrary: *Id.*

The fact that the engine habitually scattered sparks to such an extent as to endanger combustible material along the line of the road, is one from which the jury may find negligence on the part of the defendant: *Id.*

RECEIVER. See *Partnership*.

Partnership—Distribution of Assets—Recovery of Judgment—Lien.—The recovery of a judgment against partners after the appointment of a receiver to take charge of the firm assets for the benefit of the firm creditors generally, creates no lien against any property or funds of the firm in the hands of the receiver. Such property or funds cannot be levied on by an execution, or reached by garnishment, for the reason of its being in the custody of the law: *Jackson v. Lahee*, 114 Ill.

A receiver was appointed on bill filed by one partner against the other for the settlement and adjustment of the partnership accounts and the payment of creditors of the firm, which was insolvent, and the court had ordered notice to be given to all creditors to come in and prove their debts before the master. It was *held*, that one of the creditors, by the recovery of a judgment against the firm during the pendency of said bill, and the filing of a creditor's bill on the same day that notice to creditors was ordered, did not acquire any lien upon the assets in the hands of the receiver, or right to be preferred over other creditors—and this more especially when such creditor proved his claim before the master, and shared in the distribution of the funds in his hands: *Id.*

SPECIFIC PERFORMANCE.

How far affected by Stipulation for Penalty.—The mere fact that a contract stipulates for the payment of liquidated damages in case of failure to perform, does not prevent a court of equity from decreeing a specific performance: *Lyman v. Gedney*, 114 Ill.

It is only where the contract stipulates for one of two things in the alternative—the performance of certain acts, or the payment of a certain amount of money in lieu thereof—that equity will not decree a specific performance of the first alternative: *Id.*

SURETY.

Right to require Indemnity or further Security from Principal—Right to Account.—A surety of a trustee cannot maintain a bill in equity to require his principal to give other and additional securities upon his bond given to secure the *cestuis que trust*, or counter security, and on his failure to give such security have him removed: *Ridgeway v. Potter*, 114 Ill.

The contract created by law between a principal and surety is, that the former shall refund to the latter whatever the surety has to pay for him. The principal is under no legal duty to a surety to keep his co-sureties in equal solvency as they were when they first became such, or to keep any co-sureties to share in the liability: *Id.*

Courts of equity, in relief of sureties under apprehension of loss or injury, have gone to the extent to allow the surety, after the debt has become due, to file a bill to compel the principal to discharge the debt for which the surety is responsible; and it has been said that a surety, when the debt has become due, may come into equity and compel the creditor to sue for and collect the debt from the principal: *Id.*

On bill by a surety on the bond of a trustee, against the trustee, to compel him to render to the court a report of his acts, including his receipts and disbursements, or his debits and credits, where the *cestuis que trust* are not made parties, there is no error in the court refusing to pass upon the report and state the account, as such a statement of the account would not conclude them: *Id.*

TAX AND TAXATION.

Goods for Export—When Power to Tax same Ceases.—Goods intended for export from the state of their production to a foreign country or to another state do not cease to be part of the general mass of the property in the state of production, subject, as such, to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation, or have been started upon such transportation in a continuous route or journey; the carrying of them to the depot where the journey is to commence is no part of that journey: *Coe v. Errol*, S. C. U. S., Oct. Term 1885.

Property in Transit.—Where property is collected from one or more points, by any means of transportation, and is awaiting the necessary preparation and facilities for further transportation, it will be deemed to be in transit while so detained, and not liable to taxation: *Board, &c., v. Standard Oil Co.*, 103 Ind.

But where property is collected, even though it may be at the point of final shipment, to await indefinitely the owner's pleasure or the rise of markets, or to undergo a partial process of manufacture, or from any other cause having no relation to the preparation for or facilities or exigencies of transportation, it will be held to have acquired a *situs*, making it subject to taxation: *Id.*

TELEGRAPH.

Failing to transmit Message to Point without the State—Statutory Penalty—Constitutional Law—Delay in transmitting Messages—Evidence—Burden of Proof.—Prescribing a penalty against telegraph companies for failing to transmit a message, is valid and constitutional,

whether the message is to a point within or without the limits of this state: *Western U. Tel. Co. v. Ferris*, 103 Ind.

Where the sender of the message proves that there was an unreasonable delay, the burden of explaining the delay is upon the company: *Id.*

A delay of several hours in transmitting a message that only requires from five to fifteen minutes for its transmission, shows a want of diligence: *Id.*

Where the business of an office is such that one operator cannot receive messages with reasonable promptness, it is the duty of the company to supply the required assistance: *Id.*

TORT. See *United States Courts*.

TRUSTEE. See *Surety*.

Payment to—Acceptance of Credit on his Individual Account.—Where a trustee holds a note belonging to the trust estate, and receives in payment thereof, wholly or partially, a credit allowed to himself on his own individual indebtedness, the payment is not, in behalf of the maker of the note, a good payment to the trust estate; although the trustee is solvent at the time of such payment: *Maynard v. Cleveland*, 73 or 74 Ga.

UNITED STATES COURTS.

Jurisdiction—Tort—Measure of Damages—Judicial Discretion.—In an action of trespass for seizing and taking personal property, *colore officii*, with circumstances of aggravation and averment of special damage, brought in Circuit Court United States, under act 3d March 1875, it is error for the court to dismiss the suit on the ground that it did not, "really and substantially," involve a dispute or controversy properly within its jurisdiction, where the conclusion reached is founded on an opinion deduced from the declaration filed that the damage complained of did not exceed the sum of \$500 and that, if the jury should render a verdict for that amount, the court would set it aside as excessive: *Berry v. Edmunds*, S. C. U. S., Oct. Term 1885.

The action being for tort and no precise rule of law fixing the recoverable damages, it was the peculiar function of the jury to determine the amount by their verdict; and in so doing they might have properly inflicted punitive damages upon the defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff; such a verdict should not be set aside "unless the court can clearly see that the jury have committed some very gross and palpable error, or have acted under some improper bias, influence or prejudice, or have totally mistaken the rules by which the damages are to be regulated: *Id.*

Where it does not appear *as matter of law* from the nature of the case, as stated in the pleadings, that there could not *legally* be a judgment recovered for the amount necessary to give jurisdiction, the court, in order to dismiss the suit for want of jurisdiction, must find, as a matter of fact, *upon evidence legally sufficient*, "that the amount of damages stated in the declaration was colorable, and had been laid beyond the amount of a reasonable expectation of recovery, for the purpose of creating a case." *Id.*

The discretion given by sect. 5, act March 3d 1875, is judicial, proceeding upon ascertained facts according to rules of law, and subject to review for apparent errors: *Id.*

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ACTIONS BY AND AGAINST RECEIVERS.

It is the purpose of the writer, in the following pages, to discuss certain general principles of law and rules of practice in regard to actions at law and bills in equity brought by or against receivers, excluding the whole subject of their appointment, and excluding also the matter of allowance of claims against them by the court without suit. And it is to be understood that the propositions here advanced have reference equally to receivers of corporations, of judgment debtors, and of partnerships, unless a distinction is specially noted.

In an action brought by a receiver it is generally considered necessary for him, since he sues in a representative capacity and not in his individual right, to set out in his pleadings the authority by which he acts, in such manner that traverse can be taken upon it: *Bangs v. McIntosh*, 23 Barb. 591; *White v. Low*, 7 Id. 204; *Potter v. Merchants' Bank*, 28 N. Y. 641. But the defendant may be estopped by his own admissions or conduct, from denying the authority of the receiver or his right to maintain the particular action; and in such case it is not required of the receiver to prove either his appointment or his authority to bring the suit: *Scott v. Duncomb*, 49 Barb. 73. And it is to be noted that the regularity, propriety, or necessity of the receiver's appointment cannot be called in question in any proceeding instituted by or against him, at least so far as regards parties or privies to the original proceeding; for they are bound by the order of appointment, and cannot attack it collaterally: *High on Receivers*, § 203. As concerns strangers,

however, the rule is not quite so clear. It has been held in Louisiana, that where a receiver sues on a promissory note, the regularity of his appointment cannot be questioned by the defendant: it is enough for the latter to know that the receiver was in fact appointed, and as such, holds the note in controversy, and that he will be discharged of his debt by payment to the receiver: *Case v. Marchand*, 23 La. Ann. 60. And in Thompson on Corporations, § 542, it is said, "it has been held that to a suit by a receiver to collect an unpaid subscription, a shareholder may aver that the receiver was improperly appointed by a decree not binding on the shareholder: *Chandler v. Brown*, 77 Ill. 333. But this doctrine may perhaps be of questionable correctness, or at least application, since the shareholder could have intervened in the proceeding by which the receiver was appointed: *Schoonover v. Hinckley*, 48 Iowa 82." Probably those who were entire strangers to that proceeding should be allowed, in a collateral action where their interests are affected by the appointment, to attack the order on the ground that it was procured through fraud and collusion, and by deception practised on the court, but for no other reason. The proceeding by receivership is *quasi in rem*, so far as it involves a sequestration of the assets, but it is not wholly *in rem* so as to be binding on all the world. So strictly is the general rule adhered to, that it has been held in Illinois, that a receiver appointed by a master in chancery (who has in that state no power to make such appointment), may nevertheless defend an action of trespass in respect of the personalty committed to his charge, if the papers were regularly issued under the seal of the court: *Brush v. Blanchard*, 19 Ill. 31.

As the receiver does not occupy any higher ground than the corporation (or firm, as the case may be), his appointment does not change the contract relations of the parties nor create a right of action where none previously existed; if, therefore, the claim which he seeks to enforce was in such shape, at the time of his appointment, that the corporation could not have maintained a suit upon it, neither can the receiver do so without taking the necessary steps to complete the liability of the debtor: *Williams v. Babcock*, 25 Barb. 109. And the fact that he is an officer of the court does not confer upon him, when he becomes a suitor for the purpose of carrying out the objects of his trust, any privileges or powers not accorded to other litigants. Thus he must pursue the appropriate and existing remedies, and (for example) if the demand is one cognisable at law,

he must apply to that forum, and there is nothing in his position which authorizes him to proceed by bill in equity: *Freeman v. Winchester*, 18 Miss. 577.

Whether a suit will properly lie in the receiver's own name, on a cause of action which accrued in favor of the insolvent prior to his appointment, or whether it must be brought in the name of the party over whom he is appointed, is a matter that is usually regulated either by the statute law of the state, or the order by which he was appointed. But if he is not directly authorized to sue and be sued in his own name, either by statute or by an order of the court from which he derives his appointment, the prevalent opinion seems to be that the suit must be brought in the name of the corporation or party in whom the right of action existed before the appointment: *Manlove v. Burger*, 38 Ind. 211; *Yeager v. Wallace*, 44 Penn. St. 294; *King v. Cutts*, 24 Wis. 627; *Newell v. Fisher*, 24 Miss. 392; *Booth v. Clark*, 17 How. 381; *Graydon v. Church*, 7 Mich. 36; *Dick v. Struthers*, 20 Rep. 643. The principle upon which this rule is predicated, is, that in the absence of such provisions, the receiver can neither be regarded as an assignee of the property intrusted to him, nor as a purchaser thereof for value. True, he is a public officer, representing both the corporation and its creditors; but he does not *succeed* to the titles held by the insolvent, nor become the legal owner of its rights in action, unless the statute declares that such effect shall follow his appointment. There are therefore only two grounds on which he can base any claim to maintain a suit in respect of such rights in his own name: (1) that the law of the state constitutes him a statutory assignee of the property of the insolvent, as is the case in New York; or, (2) that the court having taken into its own charge and custody the assets and effects of the corporation, for the purpose of administering the trust, has authorized and directed its minister, the receiver, to bring actions for the recovery of those assets in his proper person. It is in the latter aspect that we must view the decisions to the effect that it is entirely competent for the chancellor to authorize the receiver to institute actions in his own name for the recovery of assets, and in that case, being substituted in the place of the real parties in interest, he is subrogated to all their rights: *Hardwick v. Hook*, 8 Ga. 354; *Leonard v. Storrs*, 31 Ala. 488.

In accordance with the rule above stated, it is held that a receiver of the property of a partnership cannot maintain an action of trover

in his own name for the conversion of the property of the firm before his appointment; for he does not become the legal owner of the property which he is required to take in charge, nor does his appointment transfer to him the legal rights of the firm in any of their choses in possession or in action: *Yeager v. Wallace*, 44 Penn. St. 294; though see *Gillet v. Fairchild*, 4 Denio 80. But if the property has already passed into the hands of the receiver, the rule is entirely different. For he is, in that case, most certainly entitled to its possession, and therefore has a right to maintain trover in his own name for a conversion transpiring after he had reduced it to possession: *Singerly v. Fox*, 75 Penn. St. 112; *Gardner v. Smith*, 29 Barb. 68; *Boyle v. Townes*, 9 Leigh 158. And so where an execution on a judgment in favor of an insolvent bank has been legally extended on real estate and seisin thereof delivered to the receivers, they may maintain an action of forcible entry and detainer in their own names against the tenant holding possession without their consent; because, as stated by WALTON, J., "The object of the suit is to obtain possession of the real estate in question for the receivers, and not for the bank. A suit in the name of the bank would not accomplish that purpose; for the execution or writ of possession, if one was obtained, would require the officer executing it to put the bank, and not the receivers into possession:" *Baker v. Cooper*, 57 Me. 388. And this modification of the rule may reasonably be extended to all cases where the cause of action accrued after the appointment, and in favor of the receiver as receiver.

But it is sometimes a question whether the receiver has a right to maintain the action at all, either in his own name or that of another. The generally accepted rule is that in the absence of an enabling statute, he cannot do so without an order of court. That is, if the statute does not authorize him to bring suits at law for the recovery of assets or for other purposes, he cannot institute proceedings of his own motion and without the direction of the court: *Battle v. Davis*, 66 N. C. 252; *Screven v. Clark*, 48 Ga. 41; *Green v. Winter*, 1 Johns. Ch. 60. The case of *Tillinghast v. Champlin*, 4 R. I. 173, maintains the opposite view with great ability, and claims to be in accordance with the old English practice. But this decision stands practically alone, both in this country and among the modern cases in England. But of course where a statutory enactment (as the Maryland Act of 1868, c. 471, § 195) gives to the receiver of a corporation a right to sue, no special authority

from the court which appointed him need be shown : *Hayes v. Brotzman*, 46 Md. 519. And where he is not expressly authorized to sue by the order of his appointment, he may be so authorized by a subsequent order of the same court : *Lathrop v. Knap*, 37 Wis. 307.

As the receiver owes his appointment to a pending litigation, so his proceedings must be regulated with the reference to that suit, and his authority is strictly confined to the matters in controversy therein. Thus a receiver appointed in a suit in equity to foreclose a mortgage of a railroad, cannot maintain an action to recover earnings of the road accruing before his appointment, because the mortgage not attaching to them, they are not in controversy in the suit in which he was appointed : *Noyes v. Rich*, 52 Me. 115. And "if the property is in the possession of the third person who claims the right to retain it, the receiver must either proceed by suit in the ordinary way to try his right to it, or the complainant should make such third person a party to the suit, and apply to have the receivership extended to the property in his hands ; so that an order for the delivery of the property may be made which will be binding upon him, and which may be enforced by process of contempt if it is not obeyed : " *Parker v. Browning*, 8 Paige Ch. 388 ; *Davis v. Gray*, 16 Wall. 203.

As a general rule the receiver is not allowed to employ the attorney of either of the parties to the original proceeding to advise or assist him in discharging the obligations of his trust. The attorney's first duty is to his client, and on his behalf, he is already bound to scrutinize all the proceedings of the receiver, and to see that the latter is faithful in accomplishing the objects of his appointment. The undertaking to act as solicitor or counsel for the receiver, would therefore, in many instances, involve the attorney in conflicting and inconsistent duties : *Ryckman v. Parkins*, 5 Paige Ch. 543 ; *In re Ainsley*, 1 Edw. Ch. 576. This rule, however, is only intended to protect the rights of the parties to the suit, and if they make no objection, the receiver is not absolutely forbidden to employ the solicitor of either of them ; and certainly a mere stranger has no right to raise that objection when the receiver employs such solicitor to sue the stranger : *Warren v. Sprague*, 11 Paige Ch. 200.

Where an action is pending at the time of the receiver's appointment, in which the corporation is plaintiff, the proper practice is to continue the suit in the name of the receiver, by order of court on a summary application : *Talmage v. Pell*, 9 Paige Ch. 410. And

so where the corporation is party defendant to a suit properly commenced in the Court of Chancery, such action is neither barred nor abated by the subsequent appointment of a receiver over the corporation; at most, such appointment will render the suit defective, so as to make it irregular for the complainant to proceed until the receiver is brought before court by a supplemental bill in the nature of a bill of revivor: *Wilson v. Wilson* 1 Barb. Ch. 592. Nor will the appointment be sufficient ground for dissolving an attachment previously issued against the corporation; the plaintiff should have the receiver substituted and then proceed with his action: *Pickergill v. Myers*, 99 Penn. St. 602. However, it must be remembered that the receiver is a stranger to all proceedings which he finds in progress at the time of his appointment, until he is regularly brought before the court. Hence, he cannot interfere in a pending suit against the corporation, as by giving notice of a motion or conducting an appeal in his own name, unless he has been made a party to the action by order of court: *Tracey v. Bank*, 37 N. Y. 523. In this connection we may cite an interesting case recently decided by the Supreme Court of Pennsylvania. The facts were as follows: a creditor of a mutual insurance company had reduced his claim to judgment, and issued process against a garnishee who was indebted to the company on his premium note for his proportion of losses sustained, but to an amount not yet ascertained; pending this proceeding the company was dissolved by a decree of the court and a receiver appointed, who thereupon levied an assessment on all the premium notes, thereby liquidating the indebtedness of the garnishee; it was held that the dissolution of the corporation did not abate the garnishment proceedings, nor did the appointment of the receiver prevent the creditor from continuing the same, and he was therefore entitled to recover from the garnishee the amount of his claim to the extent of the indebtedness fixed upon the latter by the action of the receiver; because the attachment created a charge upon the garnishee's debt *subject to which* it passed into the receiver's hands as assets, and his action in making the assessment simply ascertained the amount of the debt upon which the creditor had levied: *Hays v. Lycoming Fire Ins. Co.*, 99 Penn. St. 621.

Upon the appointment of a receiver of a corporation, the right of action against the shareholders for their unpaid subscriptions to the capital stock vests in him, and a judgment-creditor of the corporation will be restrained from prosecuting a suit against an individual

stockholder in respect of such subscription : *Rankine v. Elliott*, 16 N. Y. 377 ; *Mann v. Currie*, 2 Barb. 294. But if the receiver fraudulently combining with the stockholders, neglects or refuses to call in unpaid stock, for the discharge of debts, the proceeding may be maintained directly by the creditor in his own name against the stockholders, making the receiver a party defendant : *Hightower v. Thornton*, 8 Ga. 486. In an action of this kind, against a delinquent subscriber, the receiver is not restricted in his recovery to the amount of the debt due to the creditor of the corporation who procured his appointment, for he acts for all the creditors and stockholders : *Mann v. Pentz*, 2 Sandf. Ch. 257.

In the next place the inquiry presents itself whether the receiver is estopped to set up the fraudulent acts of the corporation, committed prior to his appointment in a suit brought by or against him. In order to determine this question we must first answer the further query, what parties does the receiver represent ? Cases may sometimes arise where the receiver can properly be considered as representing only the corporation : and accordingly it was held in an early New York case that where a corporation has done acts in fraud of its creditors, and a receiver is afterwards appointed, the remedy cannot be pursued in his name, but must be sought directly by the person defrauded : for such fraudulent transactions would, in most cases be binding on the corporation, and therefore, also upon its representative : *Hyde v. Lynde*, 4 N. Y. 387. But in the great majority of instances it is either essential to the maintenance of the action, or a necessary deduction from the circumstances of the case, that the receiver should be held to represent not only the corporation over which he is appointed, but also the creditors and all parties in interest. Hence it is held that an action to vacate and set aside a judgment against the corporation, on the ground that it was obtained without consideration by collusion with the officers of the corporation, and in fraud of creditors, will lie in the name of the receiver ; for it is his duty, as the representative of the creditors, to resist the enforcement of the judgment ; this he could not do in the original action, because he was a stranger to that proceeding, and therefore it is open to him to proceed by direct action : *Whittlesey v. Delaney*, 73 N. Y. 571 ; *Porter v. Williams*, 9 Id. 142. So where a debt due the corporation has been fraudulently discharged, by collusion with the officers, a bill to obtain satisfaction of the debt against the original debtor, is properly brought in the name of the

receiver, for he represents the creditors: *Nathan v. Whitlock*, 9 Paige Ch. 152. But conversely, when the receiver sues on a contract made before his appointment, and it appears that the defendant was induced to make the agreement by the fraudulent misrepresentations of the agents of the corporation as to its solvency, that defence may be urged as well against the receiver as against the corporation: *Lithfield Bank v. Peck*, 29 Conn. 384.

The right of a defendant, in a suit by the receiver, to set off a claim which he holds against a corporation, is involved in considerable doubt. This, also, must depend upon the receiver's representative capacity. If he represents only the corporation, justice obviously demands that the debtor should have the same equitable right of set-off against him which he would have against the corporation itself. But, as we have already seen, he must be regarded in most instances, as the representative both of the corporation and its creditors. In the latter case, therefore, the true rule seems to be, that if the debtor holds a claim, such that it is capable of being made the basis of an independent action, it cannot be allowed as a set-off to the receiver's suit. Because, if the debtor has such an independent claim, he is, to that extent, a creditor of the corporation; as such, he is entitled to all the rights and remedies of the other creditors, if he can and does affiliate with them in the main proceedings, but to no more. Now to allow his set-off would practically amount to giving him a short cut to the very point which the other creditors are striving to reach by the indirect process of the receivership, viz.: the recovery of their debts. In other words, it would give him a manifest and unjust preference over other creditors. And further, since the receiver is the representative of the creditors in suing to recover the assets of the estate, the action, though brought in his name, is in reality a proceeding in the interest and behalf of the creditor. Now a demand against the corporation is obviously no claim against its creditors; and therefore the debtor ought not to be allowed to offer as a set-off any claim which would not be good against the creditors, were they the *nominal* plaintiffs instead of the *cestuis que trust*. This latter view is the one which controlled the decision in the well-reasoned case of *Osgood v. Ogden*, 4 Keyes (N. Y.) 70. And in support of the former position, see *Clark v. Brockway*, 3 Id. 13. The case of *Receivers v. Patterson Gaslight Co.*, 3 Zab. 283, appears at first sight to maintain a contrary doctrine, but the decision was governed by a local statute.

And a very recent case from the same court entirely supports the first position taken above: *Williams v. Traphagen*, 38 N. J. Eq. 57. On the other hand where one indebted to an estate which is in a receiver's hands is employed to render necessary services for the benefit and protection of the estate, the value of his services may be allowed as a set-off to an action by the receiver to recover the debt: *Davis v. Stover*, 58 N. Y. 473; for this, of course would be a good claim against the creditors themselves if they were suing as plaintiffs, in respect to the trust estate, instead of their representative, the receiver. A Massachusetts decision holds that in an action by the receiver of a bank, upon a debt contracted before his appointment, the defendant may set off debts held by him before the proceedings in which the receiver was appointed, but not debts purchased since that time: *Colt v. Brown*, 12 Gray 233.

Like all other representatives whose authority depends upon the action of a court, the receiver has no power, merely by virtue of his appointment in one state, to go into a foreign jurisdiction and there sue for the recovery of assets, or upon any other cause of action. As stated by Mr. Justice WAYNE, "He has no extra-territorial power of official action; none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property; none which can give him, upon the principle of comity, a privilege to sue in a foreign court or another jurisdiction, as the judgment-creditor himself might have done, where his debtor may be amenable to the tribunal which the creditor may seek:" *Booth v. Clark*, 17 How. 322; *Killmer v. Hobart*, 58 How. Pr. 452. The suit must therefore be brought, if at all, in the name of the corporation: *Hope Mut. Life Ins. Co. v. Taylor*, 2 Rob. (N. Y.) 278. But where receivers appointed in another state have power, by the laws of that state, to sell, assign, or convey the assets of the insolvent, they may assign a debt due from a citizen of a foreign state, and such assignment will give the purchaser an equitable right of action, in the courts of the latter state, at least as against the debtor, though its effect as against creditors and *bona fide* purchasers is not determined in this case: *Hoyt v. Thompson*, 5 N. Y. 320. And so, where a citizen of the state has attached a fund in the hands of one indebted to a foreign corporation, and it appears that receivers have been appointed over that corporation in the state of its domicile, such receivers cannot come into the courts here and claim the funds attached, as assets

of the corporation, because they have no extra-territorial authority. *Warren v. Union National Bank*, 7 Phila. 156. A similar case was decided in Massachusetts upon grounds somewhat different, but equally conclusive of the question, viz.: that the proceeding by appointment of receivers is in effect an involuntary assignment for the benefit of the creditors—it matters not whether the trustee be called assignee or receiver—and it is well settled that insolvency proceedings taken under the laws of a given state can have no effect, as against non-resident creditors, upon any remedies which the latter may have against property within their own state. *Taylor v. Columbian Ins. Co.*, 14 Allen 353. But this power to sue in the courts of a foreign jurisdiction, though never to be claimed by the receiver as a matter of right, may sometimes be accorded to him as a privilege, on the principles of comity which prevail between the states of the Union. But this privilege rests in the discretion of the court, and will not be granted in derogation of the rights of resident creditors. Thus it is said: “Upon principles of comity, often recognised and always acted on, except when they come in conflict with paramount rights of suitors in our courts, they [the foreign receivers] might be admitted here to protect the interests and enforce the claims of the corporation, of whose affairs they are the legal guardians there. But comity does not require us to permit the exercise of such privileges to the detriment of our own citizens who are pursuing appropriate legal remedies in this court.” *Hunt v. Columbian Ins. Co.*, 55 Me. 290; *Runk v. St. John*, 29 Barb. 585. In the case of *Graydon v. Church*, 7 Mich. 36, it was held that where a receiver was appointed on a creditors’ bill in the Court of Chancery of New York, and the debtor made a general assignment to the receiver of all his property, and the assignment was made in such form that it would be effectual to transfer an interest in lands under the statutes of Michigan, the receiver might file his bill in the courts of Michigan to foreclose a mortgage interest, or to enforce a right of redemption in real property in the latter state held by the debtor at the time of the appointment; for in such case the receiver sues, not strictly in his official character as receiver, but as an assignee, holding the legal interest in the property by virtue of the assignment by the debtor. Finally, where receivers appointed in one state bring a suit there in the name of the estate, and also sue the same defendant upon the same cause of action, but in their own names, in another state,

and obtain judgment in the latter action, such recovery will forbid any further prosecution of the suit in the former state; because the actions must be regarded as substantially between the same parties, and therefore the principle applies that a judgment in one state will bar any further suit upon the same demand in any other state: *Bank of North America v. Wheeler*, 28 Conn. 433.

It is held that where a receiver is prosecuting an unjust and vexatious suit at law, in the name of a third person, without his consent, the court which appointed him has jurisdiction to interfere and restrain him, although the application for such relief is made by persons not parties to the suit in which the receiver was appointed: *In re Merritt*, 5 Paige Ch. 125.

To turn now to the second branch of our subject—actions in which the receiver is a party defendant—it is universally held that he is an officer of the court which appointed him, that the possession of the receiver is the possession of the court, and that therefore permission of the court to sue the receiver, must be obtained before proceedings can be legally instituted against him: *DeGroot v. Jay*, 30 Barb. 483; *Angel v. Smith*, 9 Ves. 335; *Barton v. Barbour*, 104 U. S. 126. And to bring such an action without leave of the court appointing the receiver, whether before the same or another tribunal, is a contempt of that court: *Thompson v. Scott*, 4 Dill. 508; *DeGroot v. Jay*, 30 Barb. 483. And where an action is commenced without leave against a receiver appointed by a Court of Chancery, that court will generally issue an injunction to restrain all proceedings until further order: *Evelyn v. Lewis*, 3 Hare 472; *Tink v. Rundle*, 10 Beav. 318; or the proceedings may be stayed or set aside on motion or petition: *DeGroot v. Jay*, 30 Barb. 483. Nor is this rule limited to cases where the object of the suit is to recover specific property out of the receiver's possession, but applies equally to actions for a mere money demand; because, if the creditor has a right to prosecute his suit to judgment without leave, he has also a right to enforce satisfaction of it; now the judgment would be against the receiver in his official capacity, and satisfaction could only be obtained out of the trust estate in his hands; hence the result would be to take the property of the trust out of the receiver's possession, and apply it to the payment of the plaintiff's claim, without regard to the rights of other creditors or the orders of the court which is administering the trust property; "we think, therefore, that it is immaterial whether the suit is brought against him to

recover specific property or to obtain judgment for a money demand. In either case, leave should be first obtained :'' *Barton v. Barbour*, 104 U. S. 126. It has been held that the permission of the court to sue the receiver, is waived by him if he appears by counsel to the action, and want of such leave cannot be made ground for dismissing the suit after such appearance : *Hubbell v. Dana*, 9 How. Pr. 424. But it is difficult to see how this exemption from liability to suit without leave can be considered a privilege so personal to the receiver that he may waive it. In reality, it is the barrier which the court itself interposes against unwarranted interference with its own officers and against depredations upon the estate which is in its own charge and custody. The receiver, however, is protected by the court, only as respects the property of which he is directed or authorized to take possession by the order of his appointment. If he assumes to interfere with property not embraced in the decree, and to which the estate never had title, he is not acting as an officer of the court, but is a mere trespasser, and the owner of the property need not obtain permission of the court to sue the receiver for its possession : *Hills v. Parker*, 111 Mass. 508. Leave to sue will in general be given to any plaintiff who makes out a *prima facie* case against the receiver, or discloses the foundation of a valid claim : *Hills v. Parker, supra* ; *Jordan v. Wells*, 3 Woods 527.

Since the possession of the receiver is the possession of the court the whole trust estate in his hands is regarded as *in custodia legis*, and therefore cannot be taken upon any process of attachment or execution issued after the receiver was appointed : *Adams v. Haskell*, 6 Cal. 118 ; *Hooper v. Winston*, 24 Ill. 353. Hence one who has a judgment-lien on land of his debtor which is in the possession of a receiver cannot proceed to levy his execution, if he have notice of the fact that the estate is in the custody of the law ; he must apply to the Court of Chancery, which will take care to protect his interests in making a sale or distributing the proceeds : *Wiswall v. Sampson*, 18 How. 52. Or, if he believes that there is any valid reason why the land should not have passed into the receiver's hands, his proper course is to apply to the court which appointed the receiver, to ask its discharge out of custody, in order that he may proceed against it : *Robinson v. Atlantic, &c., Rd.*, 66 Penn. St. 160. But when property which has been held by a receiver is, by a decree of the court, vested in one of the parties to the suit, his title to it is thereupon perfected, and it is liable to be

taken in execution for his debts, notwithstanding the receiver has not yet been discharged by formal order of court: *Very v. Watkins*, 23 How. 469. Property in the possession of a receiver appointed by a federal court is in the possession of that court, and cannot be taken therefrom on process subsequently issued 'from a state court; application should be made to the federal court for leave to sue the receiver, or for an order upon the receiver to pay the claim: *Ohio, f.c., Rd. v. Fitch*, 20 Ind. 498. And any attempt to disturb the possession of such receiver, on the part of a suitor in a state court, without leave of the federal court first obtained, is a contempt of the latter court; *De Visser v. Blackstone*, 6 Blatchf. 235.

In regard to the liability of a receiver for torts committed by his own employees, or those of the corporation, during his receivership, there has been a considerable diversity of opinion. But recent decisions have gone far to clarify judicial opinion on this point, and to settle the law on broad and just principles. The first of these cases which we shall notice is that of *Little v. Dusenberry*, decided by the Court of Errors and Appeals of New Jersey, in November 1884, and to be found in 46 N. J. Law. 614. This was an action against the receiver of a railway corporation to recover damages for the death of plaintiff's intestate, caused by the negligence of the company's employees, the accident occurring during the receivership. In New Jersey, by statute, the receiver is authorized to "operate said railroad for the use of the public." The court (SCUDDER, J.), said: "The first error assigned on the bill of exceptions returned with this writ is, that the receiver was not liable in this action, because that under his statutory appointment he is not a common carrier, but a public officer. An examination of the cases where this immunity has been given, will show that it is limited to those that are strictly public officers, who are parts of the governmental agency of the state, entirely distinct from individual gain or profit, such as state, county, municipal, and township boards and officers discharging duties imposed on them by law, with none behind them but the public, whom they represent, and no funds to answer except those that must be taken from the public treasury. * * * There was no error in the charge to the jury that the receiver, in his representative capacity, was liable for injuries resulting from the transaction of the business of the corporation under his supervision as such receiver, the same as the corporation which he represented." And the same rule is held in *Meara v. Holbrook*, 20 Ohio St. 137,

and *Newell v. Smith*, 49 Vt. 255. So it is maintained by the United States Supreme Court, that the earnings of a railroad in the hands of a receiver, are chargeable with the value of goods lost in transportation, and with damages done to property during his management: *Cowderly v. Galveston, &c., Rd.*, 93 U. S. 352. And in Massachusetts, that receivers who are running a railroad under appointment by the Court of Chancery in another state, who act as common carriers, and are there held liable as such, to actions at law, may be sued as common carriers in this commonwealth: *Paige v. Smith*, 99 Mass. 395. A contrary view appears to obtain in Tennessee, where it was held (*Hopkins v. Connel*, 2 Tenn. Ch. 323), that the receiver of a delinquent railroad, appointed by the governor of the state under Tenn. Laws 1852, 151, 5, is a public agent, and as such, not liable for the wrongs or negligence of his employees, but only for his own tortious acts or delinquencies. But a late case (1883) from the same court seems to lean strongly to the generally accepted rule, although the point actually determined was merely that the receiver could not, in any event, be made a party defendant without leave of the court appointing him: *Rogers v. Mobile, &c., Rd.*, 16 Rep. 586. The case of *Cardot v. Barney*, 63 N. Y. 281, holds that the receiver is not liable for the negligence of his subordinates, where he does not hold himself out as a carrier of passengers, other than as an officer of the court, and is guilty of no personal neglect, the decision resting upon the general principle that a public officer, where he has no individual interest in the profits of the business intrusted to him, should not be held liable for injuries not imputable to his personal tort. But it is submitted that an examination of this case will show it to be an authority only upon the point that an *individual* responsibility cannot be fastened upon the receiver; and this view is not at all inconsistent with the rule allowing a recovery against him in his representative capacity, and to be enforced against the trust funds in his hands. We are therefore justified, by the weight of authority, in accepting the doctrine that a receiver who is operating the road, either by statutory authority or by the order of his appointment, is liable in his representative capacity for damages arising from the wrongful acts or negligence of his employees committed under his management.

In the next place it is established beyond contradiction, that where a railroad corporation is sued in damages for injuries occasioned by the negligence of employees on the road, it is a complete and perfect

defence, that at the time of the injuries complained of, the road was in the hands and under the control of a receiver, who was operating the road as a common carrier, being thereto empowered by statute or order of court. In other words, where the receiver is liable, the corporation itself is *not*; any such claim is a liability of the receivership, to be enforced against the trust fund: *Hicks v. International, &c., Rd.*, 62 Tex. 382; *Rogers v. Mobile, &c., Rd.*, 16 Reporter 536; *Bell v. Indianapolis, &c., Rd.*, 53 Ind. 57; *Metz v. Buffalo, &c., Rd.*, 58 N. Y. 61; *Ohio, &c., Rd. v. Davis*, 23 Ind. 553; though see, as a case under a local statute, *Louisville, &c., Rd. v. Cauble*, 46 Ind. 277. But an important distinction is formulated in the case of *Railroad Co. v. Brown*, 17 Wall. 445, as follows: where a railroad was being run on the joint account of a receiver of a part of it and the lessees of the remaining part, it was held that an action would properly lie against the corporation itself for injuries sustained by a passenger at the hands of servants employed by the parties jointly operating the road; because the rule that the corporation is not liable in damages when the receiver is so liable, is never to be applied, unless the possession of the receiver is exclusive, and the employees of the road are wholly controlled by him; in this case, the receiver and the lessees would be jointly liable, and if so, the original company would also be responsible, for the servants, under such an employment, are as much the servants of the corporation as of the receiver and lessees.

It seems that specific performance of a contract made with the corporation before the appointment of the receiver, cannot be exacted of the latter. In a recent case before the Supreme Federal tribunal, the facts were as follows: a railroad company and an express company made a contract, whereby, in consideration of a loan of money, the railroad agreed to grant to the express company the necessary privileges and facilities for the transaction of all the express business over its road; the road having passed into the hands of a receiver, the express company brought a bill in equity against him, upon leave, for specific performance; but SWAYNE, J., said: "There is another objection to the appellant's case, which is no less conclusive. The road is in the hands of the receiver appointed in a suit brought by the bondholders to foreclose their mortgage. The appellant has no lien. The contract neither expressly nor by implication touches that subject. It is not a license as insisted by counsel. It is simply a contract for the transportation of persons and property over the road.

A specific performance by the receiver, would be a form of satisfaction or payment which he cannot be required to make. As well might he be decreed to satisfy the appellant's demand by money, as by the service sought to be enforced. Both belong to the lienholders, and neither can thus be diverted:" *Express Co v. Railroad Co.*, 99 U. S. 191; and see *Commonwealth v. Franklin Ins. Co.*, 115 Mass. 278. In any case, where judgment is rendered against a receiver, it must be so entered as to be enforceable only against the funds which are or ought to be in his hands: *Commonwealth v. Runk*, 26 Penn. St. 235.

As to the responsibility of the receiver in respect to his own conduct, he is governed by the same general rules which apply to most classes of trustees. Thus it is his duty to keep the trust fund entirely separate and distinct from his own money; and if he deposits it in a bank in his own name, or loans it out, even temporarily, or mixes it with his own funds and uses them together, or employs the trust fund in trade, it is a breach of trust, and he will be chargeable with interest: *Utica Ins. Co. v. Lynch*, 11 Paige Ch. 520. And if he wilfully and corruptly exceeds the powers conferred upon him by the court, he is liable for the actual damage sustained by reason of such misconduct: *Stanton v. Alabama, &c., Rd.*, 2 Woods 506. And where one of two receivers misappropriates the funds, and the other is grossly negligent, giving no attention to the duties of the trust, they will be jointly liable for the balance found due, and will be chargeable with interest: *Commonwealth v. Ins. Co.*, 14 Allen 344.

H. CAMPBELL BLACK.

Williamsport, Pa.

RECENT ENGLISH DECISIONS.

High Court of Justice, Queen's Bench Division.

APPLEBY v. FRANKLIN.

The rule of law that a person who has been injured by a felony is not allowed to bring an action upon it for damages until he has instituted criminal proceedings, only applies between parties injured and injuring, and not where the plaintiff has been indirectly injured in the loss of his servant or daughter's services.

THIS was an action for loss of service by seduction.

The statement of claim alleged, in the 1st paragraph, that the defendant had seduced the plaintiff's daughter and servant, and in

the 2d paragraph, that the defendant had administered noxious drugs to the plaintiff's said daughter for the purpose of procuring abortion, whereby she has been made ill and incapacitated for service.

The defendant took out a summons before Master FRANCIS, to strike out paragraph 2, on the ground that it disclosed a felony for which there had been no prosecution, and that, therefore, no cause of action arose upon it. The Master struck out the paragraph, and the plaintiff appealed to STEPHEN, J., in chambers, who referred the question to the Divisional Court.

H. Terrell, for the plaintiff.

A defendant cannot demur to a statement of claim on the ground that it shows the cause of action to amount to a felony: *Roope v. D'Avigdor*, 20 Q. B. D. 412. Nor can the objection be taken by plea: *Osborn v. Gillett*, L. R., 8 Ex. 88. The objection, if it is maintainable, can only be taken by the attorney-general. It is difficult to trace the origin of the doctrine that a civil right is merged in a felony. The whole question was fully discussed in the case of *Wells v. Abrahams*, L. R., 7 Q. B. 554. That was a case of trover and trespass for a brooch, and it was there held that the judge was bound to try the issues on the record, and that he was right in not having nonsuited the plaintiff. BLACKBURN, J., in his judgment, refers to the case of *Markham v. Cobb*, Sir W. Jones 147, as the origin of all the dicta in the books upon the subject. This case is distinguishable from *Wellock v. Constantine*, 2 H. & C. 146. In that case the action was brought by a woman for an assault amounting to a rape, and it was held to be not maintainable until after the defendant was prosecuted, because it was her duty to prosecute, and because, if the plaintiff had consented, she could not maintain the action for assault at all. In the case of *Ex parte Ball, In re Shepard*, 10 Ch. D. 667; BRAMWELL, L. J., throws considerable doubt upon the value of that case as an authority.

L. G. Pike, for the defendant.

A general duty is cast upon the plaintiff in this case to prosecute: *Osborn v. Gillett*, Ord. 18, R. 1, is discretionary, and the court will not interfere with the discretion of the Master when properly exercised.

HUDDLESTON, B.—The Master in this case, has struck out the 2d paragraph of the statement of claim, and my brother STEPHEN has

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referred the matter to us. The statement of claim was made by a mother alleging that the defendant had seduced her daughter. In the 2d paragraph it was stated that the defendant had further injured her daughter by administering drugs to her for the purpose of procuring abortion. It was said that the Master was right, because paragraph 2 disclosed a felony which could not be actionable until prosecuted. Mr. *Terrell* says the objection cannot be taken by demurrer nor by plea: *Roope v. D'Avigdor*. However, it seems clear from the case of *Wells v. Abraham*, that there may be a power to strike it out, and there is strong authority to show that a party injured cannot maintain an action against the party injuring him: *Wellock v. Constantine*. In that case WILLES, J., nonsuited the plaintiff, on the ground that she was the party injured. This was noticed in the case of *Ex parte Ball, In re Shepard*, although some doubt was suggested whether *Wellock v. Constantine* was an authority; at all events, BRAMWELL and BAGGALAY, L.JJ., decided in favor of the plaintiff, on the ground that the duty to prosecute, if any, was not in him; therefore, when a person who is himself or herself injured, takes civil proceedings for the injury, no action will lie until there has been a prosecution in a criminal court. This rule does not apply when the party suing is not the party injured. A master or father who sues for loss of service, can maintain the action even if a felony is committed. In the case of *Osborn v. Gillett*, it was held that the master could not maintain an action for the loss of his daughter and servant, who had been immediately killed; but the 4th plea, that the act amounted to a felony, and that the person committing it had not been prosecuted, was held bad. The argument of *Graham* in that case quoted *White v. Spettigue*, 13 M. & W. 603, as establishing that the rule as to a right of action being suspended by felony, was not applicable except between the party injured and the criminal: *White v. Spettigue* is in point. In this state of things we are bound by *Osborne v. Gillett*, and the Master was wrong in striking out the 2d paragraph. It would be a scandalous failure if the defendant could not be made amenable to damages in such a case. The appeal must be allowed with costs.

WILLES, J.—I am of the same opinion, and the authorities leave no room for doubt. A person injured cannot bring an action for a cause which amounts to a felony until he has prosecuted the felon. Such a claim is not demurrable, nor can it be objected to by plea

because, if either of these were allowed, it would extinguish the cause of action. Whether the cause could be suspended or withdrawn until the condition was fulfilled or not, is another matter, but no better course could, in my opinion, be adopted than striking out that which is wrongly put in. This, however, could only be done against a person who is under an obligation to prosecute, and that is not the case here: *Osborne v. Gillett*, is strictly in point.

The English rule that a party directly injured by an act amounting to a felony in the defendant, could not maintain a civil action for damages merely, was supposed to rest on several grounds. One was that by the felony all the defendant's lands and goods were forfeited to the crown, and so it was useless for the plaintiff to sue, since a judgment could bring him no satisfaction. Another was, the action was said to be merged in the felony, in the same manner as a note is merged in a judgment upon it. But probably the true ground was, not that the civil remedy was merged in the felony, and so forever gone, but that from principles of public policy, the courts would not sustain private actions in such cases until the party injured had done all in his power to bring the offender to public justice; it being at that time, as is well known, no person's official duty to prosecute for crime, and some stimulus was necessary to induce the injured party to carry on a criminal prosecution in order to clear the way for his private redress: see *Crosby v. Leng*, 12 East 413. If therefore, he had discharged that duty, and the guilty party had been convicted of the felony, the civil action could go on: *Markham v. Cobb*, Noy 82; *Dawkes v. Coceneigh*, Style 346; *Grafton Bank v. Flanders*, 4 N. H. 243. And this was so, even though the accused had been acquitted of the felony; the owner might then bring his civil action, since his public duty had been discharged, unless indeed he had aided in procuring the acquittal: *Crosby v. Leng*, 12 East 409; *Smith v. Weaver*, 1 Taylor 58; *Morgan v. Rhodes*, 1 Stew. 70.

The hardship of first requiring a criminal prosecution before a private action could be maintained, was never more forcibly illustrated than in the late English case of *Wellock v. Constantine*, 2 H. & C. 146 (1863), in which a young woman was not allowed to maintain an action for a felonious assault upon her, by which her life was endangered, until she had publicly prosecuted the offender criminally; and as that could be done only at her own private expense, this was a simple and gross denial of justice. A much better rule had been adopted in this country several years before in *Koenig v. Nott*, 3 Hilton 323 (1859). This old common-law rule has been sometimes adopted in America in all its rigor: *Foster v. Tucker*, 3 Greenl. 458; *Boody v. Keating*, 4 Id. 164; *Crowell v. Merrick*, 19 Me. 392; *Belknap v. Milliken*, 23 Id. 381. This was subsequently changed by statute in Maine, so far as it related to *stolen property*, but apparently no further.

The English rule was also adopted in Alabama: *McGrew v. Cato*, Minor 8; *Middleton v. Holmes*, 3 Port. 424; *Blackburn v. Minter*, 22 Ala. 613; *Martin v. Martin*, 25 Id. 201; *Nelson v. Bondurant*, 26 Id. 341; *Bell v. Toy*, 35 Id. 184. So in Georgia: *Adams v. Barrett*, 5 Ga. 404; *Neal v. Farmer*, 9 Id. 555; *McBain v. Smith*, 13 Id. 315. So in New Brunswick: *Pease v. McAloon*, 1 Kerr 111.

Pennsylvania seems to have indirectly recognised this doctrine; for notwithstanding its disapprobation in *Piscataqua Bank v. Turnley*, 1 Miles 312 (1836), in the District Court of Philadelphia; yet in a

subsequent case before the Supreme Court, *Hutchinson v. Bank of Wheeling*, 41 Penn. St. 42 (1861), it was held, that the right of action for articles stolen in 1850, was suspended from March 1852 to September 1852, while a criminal prosecution was pending against the thief; so that a civil action commenced in August 1858, more than six years after the taking, was not barred by the statutes of limitations. A directly contrary result was reached in *Hawk v. Minnick*, 19 Ohio St. 462 (1869).

On the other hand, considering that in this country there is no general forfeiture of lands or goods, for the commission of a felony (except treason); considering that every state has an official public prosecutor of crime; considering that no stimulus of that kind is now necessary; the prevailing doctrine here is that the English rule does not apply, and the civil remedy may proceed, whether the offender has or has not been publicly prosecuted, or any steps taken by the injured party to bring him to justice.

The earliest dissent in Massachusetts from the common-law rule seems to have been in the case of *Boardman v. Gore*, 15 Mass. 331, decided in 1819, which did not however call for a direct decision on the point, since in that case the defendant made a note payable to one Cushing, and then forged the name of Cushing as endorser, and passed it to the plaintiff, who discounted it, and he was allowed to recover the amount thus loaned to the defendant as money had and received, notwithstanding the forgery. See also *Ocean Ins. Co. v. Fields*, 2 Story 74.

But the question directly arose again in *Boston & Worcester Rd. Co. v. Dana*, 1 Gray 83 (1854), in which the suit was against the agent of the company, for money which he had stolen from the drawers of the ticket clerks in their depot in Boston, and notwithstanding an earlier nisi prius decision of SEWALL, C. J., to the contrary, the English rule

was entirely repudiated in a very able opinion by BIGELOW, J., too long to be quoted here.

It was cited and approved in the subsequent case of *Atwood v. Flak*, 101 Mass. 365 (1869), in which it was said a wrongdoer was not entitled to any special privilege, because his tort also amounted to a crime.

Perhaps the earliest recorded disapprobation of the English rule, to be found in our reports is in the case of *Cross v. Guthery*, 2 Root 90 (1794), which was an action by a husband against a surgeon for negligently causing his wife's death, by malpractice, the court somewhat erroneously saying, "the rule is applicable in England only to capital crimes." However, the Supreme Court of New Jersey in a nisi prius case had some time before refused to apply the English rule to a civil action for fraud in passing to the plaintiff certain forged certificates: *Ratton v. Freeman*, 1 Cox 113 (1791).

In 1812, by a divided court of three to two, the Constitutional Court of South Carolina decided that a civil action by a master for enticing away a negro slave (made a capital felony by statute) could be maintained, as the civil action could not be merged in the felony, and the question of a felony "ought not to be tried in such a collateral way." *Robinson v. Culp*, 1 Const. Rep. by Treadway 231; 3 Brev. 302. And this was followed in the Court of Appeals: *Cannon v. Burris*, 1 Hill 372 (1833), which was trespass for feloniously killing the plaintiff's cow. Missouri also disapproved of the doctrine in *Nash v. Primm*, 1 Mo. 125 (1822); *Mann v. Trabee*, Id. 709 (1827).

One of the best considered cases on this side of the question, is that of *White v. Fort*, 3 Hawks 251 (1824), North Carolina, which was a civil action for burning the plaintiff's house and barn, in which the defendant had been complained of before the grand jury and no bill found. The real question was whe-

ther a conviction or acquittal by a petit jury was a condition precedent to the maintenance of the civil remedy ; but the doctrine of the case goes to the whole extent of denying the existence of the English rule in this country, under any circumstances. Judge WARE in 1825, declared no such rule obtained in this country, and forcibly stated the reasons why, in *Plummer v. Webb*, 1 Ware 71.

In *Allison v. Bank*, 6 Rand. 223 (1828), Judge GREEN of the Court of Appeals of Virginia, in a very elaborate opinion, declared against the doctrine, saying among other things, "There is not a single adjudged case reported to this day, in which a civil action founded on a wrong amounting to a felony has been adjudged not to lie." As this was several years after *Foster v. Tucker*, 3 Greenl. 460 (1824), and *Boody v. Keating*, 4 Id. 164 (1826), this remark of Judge GREEN's was not strictly correct.

In 1833, the question arose in *Pettin-gill v. Rideout*, 6 N. H. 454 ; trespass for taking the plaintiff's horse, which had in fact been stolen, *RICHARDSON, C. J.*, said "How a civil remedy can at this day be considered as merged in a felony counsel has made no attempt to explain, nor does it seem to us to admit of any explanation. To call a suspension of the civil remedy, until the criminal justice of the state is satisfied, a merger is in our opinion very little, if any, short of an abuse of language." The same judge had previously expressed the opinion that at all events, the civil remedy could be suspended only until after the trial of the alleged offender : *Grafton Bank v. Flanders*, 4 N. H. 239 (1827). The Supreme Court of Tennessee, in *Ballew v. Alexander*, 6 Humph. 433 (1846) citing and approving *Boardman v. Gore*,

15 Mass. 337, declined to sustain a plea of felony as a defence for an aggravated assault and battery upon the plaintiff.

In *Mitchell v. Mims*, 8 Tex. 6 (1852), the Supreme Court were inclined to think that the better opinion is that the doctrine is not applicable in this country.

In *Newell v. Cowan*, 30 Miss. 492 (1855), it was declared that the rule, together with the reason on which it was founded, "has long since been exploded."

Lofton v. Vogles, 17 Ind. 106 (1861), declared no such rule prevailed in the "United States." And Michigan, in 1867, was of the same opinion : *Hyatt v. Adams*, 16 Mich. 189.

In Arkansas and perhaps elsewhere, the English rule is expressly repealed by statute : *Brunson v. Martin*, 17 Ark. 277.

The conclusions to which the foregoing review leads us are, that in this country with a few exceptions :

1st. A private injury is not "merged" in a felony, so that the right of recovery is forever gone, even though the criminal has been convicted and punished.

2d. That it is not necessary that a criminal trial should be had before a civil suit can be commenced.

3d. That if the private action is first commenced, it will not be suspended or continued, until after the criminal has been convicted.

4th. That consequently the Statute of Limitations will not be suspended during the pendency of a criminal prosecution.

5th. That in the few states where the contrary doctrine has been more or less recognised, it has never been extended to *misdeemeanors*, but is strictly confined to felonies : 4 Ohio 376 ; 6 B. Monroe 38 ; 15 Geo. 349 ; 16 Id. 203.

EDMUND H. BENNETT.

Boston.

RECENT AMERICAN DECISIONS.

Supreme Court of Missouri.

COOVER v. JOHNSON.

Where a statute provides that no condition attached to a sale of personal property shall be valid as against creditors of the vendee or subsequent purchasers from such vendee in good faith, unless such condition is evidenced by writing acknowledged and recorded, a condition that the title shall not pass until payment of the price, although unwritten and unrecorded, is valid as against creditors of the vendee who at the time of the sale, had notice of the condition.

APPEAL from Greene Circuit Court.

The facts are stated in the opinion, which was delivered by SHERWOOD, J.—Johnson bought a pair of scales of Fairbanks & Co. The sale was a conditional one, the title being retained in the vendors until the property should be fully paid for. Johnson, after the scales were shipped to him at the town of Republic, paid the freight, receipted for them and asked and received permission of the station agent for them to remain in the freight house, at Johnson's risk. This permission was, shortly thereafter, extended on the same terms, the station agent agreeing to ship the scales to Johnson in the state of Kansas, to which state Johnson soon afterwards went, not having paid any portion of the purchase-money. Coover is a creditor of Johnson's of some years standing, a portion of the indebtedness having accrued as far back as 1878, and all of it prior to the time Johnson bought the scales. The note in suit is dated January 23d 1882, due one day after date, and matured the day Johnson made his exit. Coover kept store in Republic; was well acquainted with Johnson, who at one time had done business for him; knew of his intended departure two or three days before it occurred and, prior to suit brought, was thoroughly conversant with the terms of the contract of sale made between Fairbanks & Co. and Johnson. Coover having brought suit against Johnson and attached the scales referred to, Fairbanks & Co. interpleaded, claiming them as their property, and on trial had of their interplea, the foregoing facts were elicited.

On those facts, the court, at the instance of the interpleaders, declared the law as follows:

That if you believe from the evidence that Johnson was indebted to Coover for the debt sued on in this suit at the time he executed

the contract of purchase with Fairbanks & Co. for the scales, and that Johnson left the country and failed to carry out his contract with Fairbanks & Co., and you further believe that Coover knew the terms and conditions upon which Johnson purchased said scales, and, with that knowledge, attached the scales in controversy as the property of Johnson on said debt due from Johnson to him, Coover, then the judgment should be for the interpleaders, Fairbanks & Co.

But the court, though requested by plaintiff so to do, refused to declare the law, that: the condition in the contract of sale in evidence, that Fairbanks & Co. do not relinquish their title to the scales and its attachments in question, until said property in question is paid for, is null and void as to creditors of defendant Johnson, said contract not having been acknowledged and recorded, as in case of mortgaged personal property; and if the evidence proves that defendant, Johnson, owed the plaintiff, Coover, the note here sued on, when this suit of Coover's was commenced, and that the scale and its attachments were shipped by interpleaders from St. Louis to Republic, Mo., on the railroad, to defendant, Johnson, and at Republic delivered by the railroad company to Johnson, and plaintiff, Coover, afterward had said property attached in this suit, then interpleaders cannot recover it in this proceeding.

Other declarations of law were given, and others refused, but those just copied present and contain the kernel of this cause.

It has frequently been decided in this state that the seller of personal property might by contract with the buyer reserve the title of such property in himself, until payment was made, and that such reservation would be valid, even as against a *bona fide* purchaser: *Wangler v. Franklin*, 70 Mo. 659; *Robbins v. Phillips*, 68 Id. 100, and cases cited; *Sumner v. Cottey*, 71 Id. 121.

But those adjudications were made in cases which arose prior to the statutory provisions to which plaintiffs counsel have called our attention. Section 2505, R. S., 1879, contains an amendment of, or clause additional to, § 10, Gen. Stat., ch. 107, enacted in 1877, in these words: "And no sale of goods and chattels, where possession is delivered to the vendee, shall be subject to any condition whatever, as against creditors of the vendee, or subsequent purchasers from such vendee in good faith, unless such condition shall be evidenced by writing, executed and acknowledged by the vendee, and recorded as now provided in cases of mortgages of personal property." Section 2507, R. S., 1879, is an original section, enacted

for the first time in 1877, and contains similar prohibitory provisions, declaring that "Such condition, in regard to the title so remaining, shall be void as to all subsequent purchasers in good faith and creditors, unless," etc. It cannot be doubted that the legislature, by these sections, intended to make a radical change in the law relating to conditional sales of personal property, and to prevent secret and unrecorded transactions and contracts of sale from being used to the detriment of unsuspecting creditors of, or purchasers from, the vendee of personal property apparently the owner thereof. This I regard as the whole object, purpose and scope of the law, as it now stands.

Here, so far as the attaching creditor was concerned, there was in fact no secret lien, no hidden trust, no false appearance, no concealed ownership; nothing, in short to induce him to alter his condition, incur needless litigation or expense, or which could in any manner operate to his prejudice.

There is a wide divergence in judicial opinions as to the legal effect which should be given to conditional sales of chattels, when by the terms of the contract of sale, there is a reservation of title in the vendor; but, except where controlled by statutory regulation, all the authorities concur in holding the condition binding as between the parties. And even those authorities which uncontrolled by statute, hold that title will pass to a *bona fide* purchaser, deny this result, where the purchaser has notice: *Stadtfield v. Huntsman*, 24 Alb. L. J., 185; 1 Benj. Sales, § 425.

In Illinois, by statutory provision, all such agreements are treated as chattel mortgages, and void as to third persons if not recorded in like manner as such instruments. The statute of that state makes no exception in favor of any person whatsoever. Notwithstanding this, in a somewhat recent case, in that state, special stress was laid on the fact that the creditor was *bona fide*, having no reason but to rely on the apparent ownership of the property by his debtor; and it was there ruled, that in this regard, a purchaser without notice and a *bona fide* creditor stand on the same footing of equal protection: *Van Duzar v. Allen*, 90 Ill. 499. In respect to a similar statute in our own state: § 2503, R. S., 1879, in relation to mortgages of personal property, and requiring them to be recorded in order to their validity against third persons, no exception having been made in favor of any one, it has been several times ruled that, even if a purchaser had *actual knowledge* of the mortgage, he would nevertheless

obtain a good title: *Byrson v. Penix*, 18 Mo., 18; *Bevans v. Bolton*, 31 Id. 437. And, in regard to § 2500, R. S., 1879, touching loans of personal property, and making their registry requisite, so as to be valid against creditors and purchasers, but containing no exception, a like ruling has been made: *Cook v. Clippard*, 12 Mo. 379. If it be presumed that the legislature was not ignorant of the rulings in the cases just cited, and taking this for granted, it must be apparent, that when they inserted the words "as against creditors of the vendee or subsequent purchasers from such vendee in good faith," in § 2505, and similar words in § 2507, their design was to prevent actual knowledge in a purchaser or creditor from being held in less esteem than constructive notice, as imparted by the record. The sections in question are somewhat awkwardly worded, but I am persuaded that the expression *bona fide*, applies as well to creditors as to subsequent purchasers. Indeed, no reason can be discovered why the one class should receive greater legislative favors than the other. Such statutes as the sections under discussion have, of late years, been enacted in many of the states, as for instance in Vermont, where the statute provides that "No lien reserved on property sold conditionally, and passing into the hands of the conditional purchaser, shall be valid against attaching creditors or subsequent purchasers without notice, unless," etc. And upon this statute it was ruled, that as the contract of sale was not placed on record, the property sold "was open to attachment as the property of the conditional vendee, unless the plaintiff could show that the attaching creditor had notice of the conditional sale." *Whitcomb v. Woodworth*, 54 Vt. 544. A decision of like effect on similar statutory provisions has been made in Iowa: *Singer S. M. Co. v. Holcomb*, 40 Iowa 33.

The language of the statutes just cited, "attaching creditors or subsequent purchasers without notice," is not essentially different in point of legal effect from the phraseology employed in our own law. "Without notice," and "in good faith," are equivalent terms: *Lee v. Bowman*, 55 Mo. 400.

Holding these views, the judgment should be affirmed.

The Supreme Court of Missouri has often held, that in the absence of controlling statutory regulations, personal property may be sold on condition, and while the condition remains unperformed the right of property remains in the ven-

dor: *Sumner v. Cotter*, 71 Mo. 121; *Ridgeway v. Kennedy*, 52 Id. 24; *Little v. Page*, 44 Id. 412; *Parmlee v. Catherwood*, 36 Id. 479; *Griffin v. Pugh*, 44 Id. 326; *Diver v. Denney*, 6 Mo. App. 578; *Willard v. Sumner*, 7 Id. 577.

And the same court holds that the vendor may assert his right to the property, even against a *bona fide* purchaser, unless he (the vendor) has been guilty of laches: *Robbins v. Phillips*, 68 Mo. 100, 101; *Wangler v. Franklin*, 70 Id. 660.

Yet it is to be observed that the decisions were made prior to the enactment of the statute, construed in the principal case.

This same rule has also been adopted in many other states: see 1 Benj. on Sales (4th Am. ed.) § 437, *et seq.*, where the cases are collected.

But that the vendor may have control over the property, in such cases, it is necessary before he parts with possession to expressly stipulate that the title shall remain in him, until all the conditions shall have been complied with by the vendee; as in a contract of sale of goods, which is to be complete after examination and approval by the purchaser; *Blood v. Palmer*, 11 Me. 420; *Crocker v. Gullifer*, 44 Mo. 493; *Morse v. Stone*, 5 Barb. (N. Y.) 516.

Where the manifest intention of the parties is, that the vendor retain the title, no property passes until all conditions are performed. Thus in *Keeler v. Field*, 1 Paige Ch. 312, a merchant contracted for goods, the price to be secured by his notes, endorsed by B. and C., and the goods in the meantime were forwarded to his residence. The notes were never delivered. The goods were afterwards assigned to B. and C. The court held that the title never passed to the vendee, as the condition upon which the sale was made had not been performed, and that B. and C. could not hold them against the vendor. In *Haggerty v. Palmer*, 6 Johns. Ch. 437, goods were sold at auction in the city of New York, to be paid for in *approved endorsed* notes at four and six months. The goods were delivered to the vendee, and he afterwards assigned them to a third party. The court held that the delivery of the goods was conditional, and the vendee was a trustee

for them until the notes were delivered, and that the assignment was fraudulent.

In *Crawford v. Smith*, 7 Dana (Ky.) 59, plaintiff made an agreement to sell goods then in his store to defendants. The next day, the parties commenced invoicing the goods to ascertain the amount to be paid by the defendant for them. During the night, after a considerable portion of the goods had been invoiced, a thief broke into the store and stole sundry articles of the aggregate value of \$300, some of which, of the value of \$40 had been invoiced. Crawford brought suit against Smith for the value of the goods. No recovery was allowed because he had not parted with the possession of the goods: see also *Ward v. Shaw*, 7 Wend. (N. Y.) 404.

The vendor may estop himself from claiming title, in contracts of this nature as against a *bona fide* purchaser from the vendee in possession, as where he gives vendee evidence of title, or express or implied authority to sell. This principle appears quite well settled, but in its application the cases are at variance: 1 Benj. on Sales (4th Am. ed.) § 448, *et seq.*

In dealing with contracts of this nature to avoid confusion an important distinction is to be noted between an option to purchase if the vendee should like the article, and an option to return it, if he should not like it. In the first, the title will not pass until the option is determined; in the second, the title passes at once. One is an agreement to sell, and the other is an absolute sale. *Hunt v. Wyman*, 100 Mass. 198, clearly illustrates this distinction.

In the transfer of title to personal property upon a cash sale, only two things are essential, namely, payment by the vendee, and actual or constructive delivery by the vendor. The first may be waived, and is waived by vendor by delivery, for confidence is reposed, credit is given and property passes: *Chapman v. Lathrop*, 6 Cowen 110; *Harris v.*

Smith, 3 S. & R. 20, 24; 2 Kent's Com. 391.

It is also a familiar principle that where personal property passes out of the hands of the vendor, he thereby loses all right of lien. The only exception is in cases of *stoppage in transitu*, and that can be exercised, only when the vendee is insolvent, and before the goods get into his possession: Benj. on Sales, § 828, and notes.

The proposition is also well settled that the delivery of an article at a fixed price, to be paid for on approval, at the option of the receiver, constitutes a sale, and is treated in all respects as the property of the vendee.

We shall cite but a few cases to illustrate this rule. In *Crocker v. Gullifer*, 44 Me. 493, the defendant took horses from the plaintiff, and agreed to pay for or return the same, but it was specifically agreed that the title should remain in the plaintiff (vendor). This was held to be a bailment, because the title had never passed out of the plaintiff. The court said: "The general proposition that the delivery of an article at a fixed price, to be paid for or returned, constitutes a sale, is not questioned. When the option is with the party receiving, to pay for or return the goods received, the uniform current of authority is, that such alternate agreement is a sale." In *Holbrook v. Armstrong*, 1 Fair. (Me.) 31, there was a parol agreement to pay for the property in dispute, or return the same at the end of two years. This was held to amount to a sale. In *Dearborne v. Turner*, 16 Me. 17, it was held that Mason, who received the property, "having to return or pay, the property passed to him, and he was at liberty to sell." In *Baswell v. Bicknall*, 17 Me. 344, the party receiving the article in dispute, verbally agreed to pay a certain price therefor, or return the same in a given time. "The property," remarked WESTON, C. J., "in the thing delivered passes, and the remedy of the former

owner vests in contract. It is the option conceded to the party receiving, which produces this effect." In *Perkins v. Douglass*, 20 Me. 317, the written promise was to return the chattel or pay therefor. SHEPLEY, J., said: "Such a contract does not reserve to the seller a right in the property for the security of the purchase-money." In *Southwick v. Smith*, 29 Me. 228, notes were given for hides, and a further agreement to return the leather made from the same, if the notes should not be paid at maturity, and the proceeds to be applied to their payment. This was held to be a sale. The following additional cases also well illustrate the rule under consideration: *Smith v. Clark*, 21 Wend. (N. Y.) 83; *Jenkins v. Eichelberger*, 4 Watts (Pa.) 121; *Prichett v. Cook*, 62 Penn. St. 193; *Walker v. Blake*, 37 Me. 373, 375; *Beffum v. Merry*, 3 Mason 478; *Ray v. Thompson*, 12 Cush. 281; *Hurd v. West*, 7 Cowen 752; *Moss v. Sweet*, 16 Ad. & El. 493; *Jameson v. Gregory*, 4 Metc. (Ky.) 363; *Chamberlain v. Smith*, 44 Penn. St. 431. The sale is not "complete while anything remains to be done to determine its quantity, if the price depends on this *unless this is to be done by the buyer alone*," per COLB, J., in *McClung v. Kelley*, 21 Iowa 511.

Conditional sales like that in the principal case, where the title of the property is to be retained in the vendor until the property is fully paid for, are of frequent occurrence, and are held binding as between the parties to the contract, in the absence of controlling statutory regulations, or where the rights of innocent third parties intervene; *Fosdick v. Schall*, 99 U. S. 235, 250; 1 Benj. on Sales (4th Am. ed.) § 425, *et seq.*, and notes, where the result of the cases are given.

Many states of the Union have enacted similar statutes to that passed upon in the principal case, and they are given full force by the courts. The avowed purpose of such restrictive legislation is to protect the interests of innocent third

persons, who contract with reference to such personal property, without notice of the conditions upon which it is held by the vendee. These statutes are to the effect that contracts for conditional sales, where possession is delivered to the vendee, and the title is reserved to the seller to secure the price, shall be void as to the vendee's creditors and buyers without notice, unless such contracts are in writing, and filed or recorded in some public office specified by the statute. The Iowa statute provides that "no sale, contract, or lease, wherein the transfer or ownership of personal property is made to depend upon any condition, shall be valid against any creditor or purchaser of the vendee, or lessee, in actual possession obtained in pursuance thereof, without notice, unless the same be in writing, executed by the vendor or lessor, acknowledged and recorded, the same as chattel mortgages;" McClain's Annotated Statute of Iowa (1880), § 1922, p. 542; Miller's Annotated Statute, § 1922.

This section has been passed upon several times by the Iowa Supreme Court: *Push v. Weston*, 52 Iowa 676; *Warner v. Jameson*, 52 Id. 72; *Singer Sewing Machine Co. v. Holcomb*, 40 Id. 33; *Rudlong v. Cottrell*, 64 Id. 234.

In *Push v. Weston*, *supra*, in construing the section, the court said: The meaning of this section doubtless is, that where a sale, etc., is made of personal property, and the transfer of title is made to depend upon any condition, the condition shall not be valid against creditors, etc., unless the terms of the sale be expressed in writing, etc. In other words creditors, etc., without actual notice of the condition, may claim that the title passed to the vendee, unless the vendor gives constructive notice of the condition in the manner provided. The sale, we think, is to be regarded invalid in no sense except as a conditional sale, but it is to be regarded as such in the absence of notice, actual or constructive. So far we presume that there is no question."

Substantially the same statutes are in force in Illinois (*Van Duzor v. Allen*, 90 Ill. 499); Maine (*Boynston v. Libby*, 62 Me. 253); Minnesota (*McClelland v. Nichols*, 24 Minn. 176); Nebraska, Texas, Vermont (*Whitcomb v. Woodworth*, 54 Vt. 544; *Bugbee v. Stevens*, 53 Id. 389); Virginia, West Virginia, and Wisconsin (*Benn v. Valley Lumber Co.*, 51 Wis. 376). For additional authority, see 1 Benj. on Sales, § 461; *Heryford v. Davis*, 102 U. S. 235; note of Lucius S. Landreth, Esq., in 21 Am. Law. Reg. (N. S.) 224, 225; also *Sumner v. Woods*, 67 Ala. 139; s. c. 42 Am. Rep. 104, with note, p. 105; and *Fairbanks v. Eureka Co.*, 67 Ala. 109, for a very elaborate discussion of the question under consideration, in the absence of statutory regulations. The conclusion arrived at in these cases, is that a purchaser of personal property from one in possession under a sale upon an unfulfilled condition gets only the conditional title of his vendor, although he buys in good faith and in ignorance of the condition.

Bridget v. Cornish, 1 Mackey (D. C.) 29, is an interesting case. Here there was a conditional sale of a buggy and harness. By the terms of the written agreement, A. "hired" of B., the property for a term of three months from date, for the sum of \$25 per month, together with a cash payment of \$50, making in all \$125, and A. was given the privilege of purchasing at the end of the time, by paying an additional \$125. The court held that the equity of the property passed with the possession to A., and that a subsequent purchaser *bona fide* from A., obtained good title, as no lien of B.'s had been recorded as required by the statute. The court said: "The presumption is, that the possessor of personal property is its owner, and the world have a right to deal with him as such. They deal at their peril, it is true, but where the title has been qualifiedly passed with the possession, and the lien upon it is not reserved according to the

conditions of the statute, which requires a written incumbrance and a record of it, the vendor of the property parts with the possession at his peril ; and if an equity in the property by purchase concurring with the possession, is found with a vendor

who sells in a public market to a *bona fide* purchaser, the sale carries title with it."

B. E. BLACK.

San Francisco, Cal.

Supreme Court of Indiana.

HOCKETT v. STATE.

The fact that an article is manufactured under a patent granted by the United States, does not prevent a state, in the exercise of its police powers, from regulating its use.

A telephone company is a common carrier, in the same sense as a telegraph company. Its instruments and appliances are devoted to public use, and are subject to legislative control ; so that the legislature of a state may prescribe the maximum charges for instruments and service.

Such regulation of property devoted to public use is not the taking of private property for public use, nor is it in any way an interference with the constitutional rights of a citizen in private property.

The word "telephone," as used in the act of April 13th 1885, designates and refers to an entire system, or apparatus composed of all the usual and necessary instruments for the transmission and reception of telephonic messages, and not to a single instrument.

Where a word has become a "term of art," evidence is admissible to explain its proper meaning.

Where a legislature has power and authority to enact a law, the courts cannot sit in judgment on its justice or expediency.

APPEAL from Marion Criminal Court.

McDonald, Butler & Mason, Baker, Hord & Hendricks, and Williams & Thompson, for appellant.

Harris & Calkins, and Byfield & Howard, for appellee.

The opinion of the court was delivered by

NIBLACK, C. J.—On the thirteenth day of April 1885, the legislature of this state passed an act entitled "An act to regulate the rental allowed for the use of telephones, and fixing a penalty for its violation ;" the tenor of which is as follows :

"Section 1. Be it enacted by the General Assembly of the state of Indiana, that no individual, company, or corporation, now or hereafter owning, controlling or operating any telephone line, in operation in this state, shall be allowed to charge, collect, or receive as

rental for the use of such telephone a sum exceeding three dollars per month, where one telephone only is rented by one individual, company, or corporation. Where two or more telephones are rented by the same individual, company, or corporation, the rental per month for each telephone so rented shall not exceed two dollars and fifty cents per month.

"Sect. 2. Where any two cities or villages are connected by wire operated or owned by any individual, company, or corporation, the price for the use of any telephone, for the purpose of conversation between such cities or villages, shall not exceed fifteen cents for the first five minutes; and for each additional five minutes no sum exceeding five cents shall be charged, collected or received.

"Sect. 3. Any owner, operator, agent or other person who shall charge, collect, or receive for the use of any telephone any sum in excess of the rates fixed by this act, shall be deemed guilty of a public offence, and on conviction shall be fined in any sum not exceeding twenty-five dollars."

On the twenty-seventh day of July 1885, Theodore P. Haughey requested the Central Union Telephone Company, a corporation organized under the laws of the state of Illinois, but owning and operating a telephone exchange and system of telephone lines at the city of Indianapolis, in this state, to rent him one telephone, to be used at his residence upon his farm, four and one-half miles from the company's telephone exchange, and two miles outside of the corporate limits of the city of Indianapolis, and to connect such telephone with the exchange by the erection of the necessary poles and wires. In response to this request, the company offered to rent to Haughey a hand telephone and magneto-bell, and to connect them with its exchange, and to furnish exchange service from 7 o'clock A. M. until 6 o'clock P. M. each day, for three dollars per month, the company to have the right to place other subscribers upon the same line. But Haughey declined to accept that offer, and instead entered into a contract with the company for the use of "one battery transmitter and one magneto-telephone," and "the necessary appliances for connecting them with the exchange," upon certain terms and conditions named in the contract, for which he agreed to pay the company the sum of \$33.50 for each quarter, or \$11.16 $\frac{2}{3}$ per month. The contract says:

"The above total sum is based upon the charges itemized as follows: Rental of one magneto-telephone and one battery transmitter

(two telephones) at the rate of \$20 per annum ; labor and service, charges for switching, construction and maintenance, charges for lines, batteries, central office apparatus, magneto-bell, and other appurtenances, at the rate of \$114 per annum."

The telephone company built the line, and furnished the equipments for the use of Haughey, called for by its contract with him. At the expiration of the first three months after the contract went into effect, the appellant, John E. Hockett, acting as the district superintendent and general agent of the company at Indianapolis, demanded of and received from Haughey the sum of \$38.50, claimed to be due, under the contract, for the latter's use of the line, and equipments therein provided for during the preceding three months. An information was thereupon filed against Hockett, charging him with a violation of the provisions of the act of the legislature hereinbefore set out, and upon proof of the matters above stated, with others of a formal, incidental, or a merely collateral character, the court below found him guilty of having charged more for the use of the telephone than the law permitted him, as well as the company he represented, to do, and, after overruling a motion for a new trial adjudged that he pay a fine as a penalty for the commission of a criminal offence.

It was shown at the trial that the articles furnished to Haughey as a telephone equipment, as well as all the other mechanical contrivances used by the company in the transmission of words and sounds over its wires, are patented articles, and that the company holds the right to use these patented articles by assignment, either direct or remote, from the patentees. It is first and most earnestly contended that, as the articles used by the company as above are under the constitution and laws of the United States, the legislature of a state has no power to limit the price, use, sale, or rental value of such articles, and that as a consequence, all acts of a state legislature of the class to which the one before us belongs are inoperative and ineffectual for any practical purpose.

Conceding the force as well as the plausibility of many of the arguments and illustrations used by counsel, the ready and indeed inevitable answer is that the question thus presented ought no longer be regarded as an open question. There is a reserved and at the same time well recognised power, affecting their domestic concerns remaining in all the states, which the government of the United States cannot and has seldom attempted to invade. This power is

so varied and comprehensive that an exact definition, as applicable to all its phases, has so far been found to be impracticable, but the instance in which the existence of such a power has been judicially recognised in particular cases are quite numerous, as well as various in their application to our complex system of government. This reserved power is usually, though perhaps not always accurately, denominated the police power of a state, and embraces the entire system of internal state regulation, having in view, not only the preservation of public order, and the prevention of offences against the state, but also the promotion of such intercourse between the inhabitants of the state as is calculated to prevent a conflict of rights and to promote the interests of all. *Cooley, Const. Lim. § 572.* It is a power inherent in every sovereignty, and is, in its broadest sense, nothing more than the power of a state to govern men and things within the limits of its own dominion: *License Cases, 5 How. 582.* It extends to the protection of the lives, limbs, health, comfort, and convenience, as well as the property, of all persons within the state. It authorizes the legislature to prescribe the mode and manner in which every one may so use his own as not to injure others, and to do whatever is necessary to promote the public welfare not inconsistent with its own organic law: *Thorp v. Rutland & B. Rd., 27 Vt. 149.*

In 1867, letters patent were issued to one De Witt for a discovery in the manufacture of a quality of oil known as "Aurora Oil," and one Patterson became the assignee of the right conferred upon De Witt by his letters patent. Under a system of inspection provided by the laws of Kentucky, some casks containing this Aurora oil were branded, "Unsafe for illuminating purposes," and, notwithstanding a statute of that state making it a penal offence to sell oil thus branded, Patterson sold the casks of oil in question to one Davis. Patterson was thereupon indicted, tried and convicted in one of the Kentucky courts for the alleged unlawful sale of these condemned casks of oil. This judgment convicting Patterson of a criminal offence having been affirmed by the Court of Appeals of that state, the cause was taken to the Supreme Court of the United States to test the validity of the statute under which Patterson was so convicted, as a restraint upon the sale of a commodity covered by letters patent from the United States. Upon a review of all the questions involved, the validity of the statute was maintained, and the judgment of the Court of Appeals was in all things affirmed:

See *Patterson v. Kentucky*, 97 U. S. 501. The court held in that case, and as we have no doubt correctly, that all that the letters patent secured was the exclusive right in the discovery, and that the right thus secured was an incorporeal right, and hence without "tangible substance;" that the right to sell the oil was not derived from the letters patent, but existed and could have been exercised before the issuing of such letters, unless prohibited by some local statute; that because the patentee acquired a monopoly in his discovery, and was hence secure against interference, it did not follow that the tangible property, which came into existence by the application of the discovery, was beyond the control of the state legislation; that, on the contrary, the right of property in the physical substance, which is the fruit of the discovery, is altogether distinct from the discovery itself, just as the property in the instruments or plate by which copies of a map are multiplied is distinct from the copyright itself; that hence the right conferred upon the patentee, and his assigns, to make, use, and vend the corporeal article or commodity, brought into existence by the application of the patented discovery, must be exercised in subordination to the police or local regulations established by the state. The doctrine of that case was approved and followed in the more recent case of *Webber v. Virginia*, 103 U. S. 344, and has the support, either in direct terms or in principle, of numerous other carefully considered cases: *Patterson v. Com.*, 11 Bush 311; *State v. Telephone Co.*, 36 Ohio St. 298; s. c. 38 Am. Rep. 586, and note; *Jordan v. Dayton*, 4 Ohio 295; *Fry v. State*, 63 Ind. 552; *People v. Russell*, 49 Mich. 617; *Thompson v. Staats*, 15 Wend. 395; *Martinetti v. Maguire*, 1 Dedy 216; *Vannini v. Paine*, 1 Harr. 65; *License Tax Cases*, 5 Wall. 462; *U. S. v. Dewitt*, 9 Id. 41; *Railroad Co. v. Husen*, 95 U. S. 465; *Beer Co. v. Massachusetts*, 97 Id. 25; *Brechbill v. Randall*, 102 Ind. 528; s. c. 1 N. E. Rep. 362; *Palmer v. State*, 39 Ohio St. 236; *Western Union Telegraph Co. v. Pendleton*, 95 Ind. 12.

While, therefore it is true that letters patent confer upon the patentee a monopoly to the extent of vesting in him, his heirs and assigns, the exclusive right to make, use, and vend the tangible property brought into existence by a practical application of the discovery covered by the letters patent for a limited time, it is not true that such exclusive right authorizes the making, using or vending such tangible property in a manner which would be unlawful

except for such letters patent, and independently of state legislation and state control.

It is next contended that the Central Union Telephone Company was organized, and has so far been conducted, as an ordinary business investment, and is in its methods, as well as in its relations to its patrons and subscribers, a merely private enterprise, no more subject to legislative control than any other private business with which a considerable number of persons have become either directly or indirectly connected; that consequently the act of the legislature under which this prosecution was instituted, is inoperative and void as a restraint upon the company in its charges for the rental and use of its instruments. The telephone is one of the remarkable productions of the present century, and although its discovery is of recent date, it has been in use long enough to have attained well-defined relations to the general public. It has become as much a matter of public convenience and of public necessity as were the stage-coach and sailing vessel a hundred years ago, or as the steamboat, the railroad, and the telegraph have become in later years. It has already become an important instrument of commerce. No other known device can supply the extraordinary facilities which it affords. It may therefore be regarded, when relatively considered, as an indispensable instrument of commerce. The relations which it has assumed towards the public make it a common carrier of news—a common carrier in the sense in which the telegraph is a common carrier—and impose upon it certain well-defined obligations of a public character. All the instruments and appliances used by a telephone company in the prosecution of its business are consequently, in legal contemplation, devoted to a public use: *State v. Nebraska Telep. Co.*, 17 Neb. 126; 24 Am. L. Reg. (N. S.) 262; *State of Missouri v. Bell Telep. Co.*, 23 Fed. Rep. 539; *State v. Telep. Co.*, 36 Ohio St. 296; *American R. Tel. Co. v. Connecticut Telep. Co.*, 44 Am. Rep. 237, and note.

It is now a well settled legal proposition that property thus devoted to a public use becomes a legitimate subject of legislative regulation and control. In recognition of that doctrine the case of *Munn v. Illinois*, 94 U. S. 113, has become a leading case. It was in general terms, held in that case, that when the owner of property devotes it to a use in which the public has an interest, he, in effect, grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public, for the com-

mon good, as long as he maintains the use to which he has so devoted his property, and that he can only escape such public control by withdrawing his grant and discontinuing the use. In support of that conclusion the court said it has been customary in England from time immemorial, and this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, and the like, and in so doing, to fix a maximum of charges to be made for services rendered, accommodations extended and articles sold. This case has been the subject of much unfriendly comment, and has encountered some very sharp criticism, but its authority as a precedent remains unshaken. This state regulation and control of property devoted to a public use is not the taking of property for a public purpose, within the meaning of section 66 of article 1, of the constitution of this state; nor is such regulation and control an interference with the guaranteed rights of the citizen in private property. As bearing generally upon the subjects last above referred to, see also, the cases of *Chicago, B. & Q. Rd. v. Iowa*, 94 U. S. 155; *Chicago, M. & St. P. Rd. v. Ackley*, Id. 179; *Winona & St. P. Rd. v. Blake*, Id. 180; *Railroad Co. v. Richmond*, 96 Id. 521; *Railroad Co. v. Fuller*, 17 Wall. 560; *Olcott v. Supervisors*, 16 Id. 678; *Ruggles v. Illinois*, 108 U. S. 526; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347; *Ruggles v. People*, 91 Ill. 256; *Illinois Cent. Rd. v. People*, 108 U. S. 541; *Alnut v. Inglis*, 12 East 527; *Mobile v. Yuille*, 3 Ala. (N. S.) 137; *N. J. Nav. Co. v. Merchants' Bank*, 6 How. 344; *Bolt v. Stennett*, 8 Term R. 606; *Com. v. Duane*, 98 Mass. 1; *Com. v. Tewksbury*, 11 Metc. 55; *Com. v. Alger*, 7 Cush. 53; *Metropolitan Board v. Barrie*, 34 N. Y. 657; *Slaughter-house Cases*, 16 Wall. 36; *Sharpless v. Mayor*, 21 Penn. St. 147; *Grant v. Courter*, 24 Barb. 232; *Bartemeyer v. Iowa*, 18 Wall. 129; *Beer Co. v. Massachusetts*, 97 U. S. 25; *Ogden v. Saunders*, 12 Wheat. 213; *Standard Oil Co. v. Combs*, 96 Ind. 179; *W. U. Tel. Co. v. Pendleton*, 95 Id. 12; *Indianapolis Rd. v. Kercheval*, 16 Id. 84; *Foster v. Kansas*, 112 U. S. 201; *Brechbill v. Randall*, 102 Ind. 528; *Fry v. State*, 63 Ind. 552; *Toledo Agricultural Works v. Work*, 70 Id. 253; *West Virginia Co. v. Oil Co.*, 5 W. Va. 382; *State v. Perry*, 5 Jones 252; *Att.-Gen. v. Railroad*, 35 Wis. 425.

The obvious deduction from what has been said, as well as from the authorities cited, is that the power of a state legislature to pre-

scribe the maximum charges which a telephone company may make for services rendered, facilities afforded, or articles of property furnished for use in its business, is plenary and complete.

It was made to appear by the evidence that there are several instruments more or less in use by telephone companies, each known as a "telephone;" one as the "Hand Telephone," another as the "Box Telephone," a third as the "Switchman's Head Telephone," and the fourth as the "Battery Transmitting Telephone;" that the first, known also as the "Bell Hand or Magneto Telephone," consists of a bar magnet; with a helix of wire at one end, and a diaphragm suitably mounted, in front of the helix, and a hard rubber case supporting the whole, with combined poles for making connection, with a cord from 24 to 30 inches long, and through it with a magneto-bell; that this telephone will both transmit and receive sounds or words carried electrically over a connecting wire; that this instrument was at first, with the assistance only of the magneto or call bell used in transmitting, as well as in receiving telephonic messages; that some time after this Bell hand telephone had thus come into use, the battery transmitting telephone, known as the "Blake Transmitter," was introduced and generally accepted as a very decided improvement in the transmission of words and sounds over wires used by telephone companies, words and sounds being transmitted through it in a louder tone, and with greater effect than through the Bell hand telephone; that for some time previous to the thirteenth day of April 1885, this Blake transmitter had come into general use in the transmission of messages with that class of patrons and subscribers who desired the best available telephonic service; that since the Blake transmitter had come into general use as stated, the Bell hand telephone had been chiefly used as a receiver of messages—only a comparatively few persons continuing to use it also for transmitting purposes; that on the day last named and for a considerable time previously, a fully equipped organization for the convenient and ready transmission and reception of messages over telephonic wires consisted, as it still consists, of a Bell hand telephone and cord, a Blake transmitter, a magneto or call bell, a cell of battery, a back-board, and a battery box; that the instruments thus constituting a telephonic equipment have been, and still are, only rented by telephone companies to their patrons and subscribers, the latter not being allowed to either purchase or to own any of such instruments.

Upon the facts thus disclosed by the evidence, it is, in the third place contended that the act of April 13th 1885, under consideration, only limits the price to be charged to three dollars per month, when one instrument known as a telephone is rented to a patron or subscriber, and does not apply to a case, like the one before us, where two instruments, each answering to that name, are, for his greater convenience, rented to the same person to be used together, and that consequently the facts of this case do not bring it within the penal provisions of that act. In a general sense, the name "telephone" applies to any instrument or apparatus which transmits sound beyond the limits of ordinary audibility. The speaking tube used in conveying the sound of the voice from one room to another in large buildings, or a stretched cord or wire attached to vibrating membranes or disks by which the voice is carried to a distant point, is, strictly speaking, a telephone. But since the recent discoveries in telephony the name is technically and primarily restricted to an instrument or device which transmits sound by means of electricity and wires similar to telegraphic wires. In a secondary sense, however, being the sense in which it is most commonly understood, the word "telephone" constitutes a generic term, having reference generally to the art of telephony as an institution, but more particularly to the apparatus, as an entirety, ordinarily used in the transmission as well as in the reception of telephonic messages. In this latter sense the Central Union Telephone Company, in behalf of which the appellant stands as the representative in this proceeding, has very significantly sanctioned the use of the word "telephone." In August, 1885, it published a book for the use of its patrons and subscribers, entitled "Indianapolis Telephone Directory," in which those having the use of its telephonic instruments were instructed as follows :

"Call by number. When through talking, ring out. Make all complaints to the chief operator, call No. 1000. Help each other by answering your telephone promptly. Do not allow non-subscribers to use your telephone; it is unjust to other subscribers, impedes the service, and is a violation of your contract."

These were a substantial repetition of instructions issued by the Western Telephone Company, one of the predecessors of the Central Union Telephone Company, in June 1883. In these instructions the "telephone" is plainly referred to as an organized apparatus,—an institution,—and not as a single instrument. In

this use of the word "telephone" the telephone companies in question, simply adopted and emphasized what had already been generally accepted as the proper meaning of that word, in the connection in which it was so used by them.

Before the great discovery of Prof. Morse in telegraphy, the power of electricity to give a sudden and mysterious impulse to a suspended wire, was well understood among those most familiar with experiments in electrical science. His discovery consisted in the invention of an instrument or machine which utilized that power of electricity, and thereby enabled him to send intelligible messages over suspended wires, to remotely distant places. When that instrument or machine first came into use, the word "telegraph" was understood to more particularly refer to it, as the thing best known by that name; but since that time a much wider and more comprehensive meaning has been attached to that word. The "telegraph" is now usually accepted, and in common parlance is generally understood, as referring to the entire system of appliances used in the transmission of telegraphic messages, by electricity, consisting of—First, a battery, or other source of electric power; secondly, of a line, wire, or conductor for conveying the electric current from one station to another; thirdly, of the apparatus for transmitting, interrupting, and, if necessary, reversing the electric current at pleasure; and fourthly, of the indicator or signaling instrument. See Imperial Dict., title "*Telegraph*."

In the respect indicated, the varying meanings of the word "telephone" are analogous to those applied to the word "telegraph;" there being very much in common between the two systems of telephony and telegraphy. In reaching a conclusion as to what is generally understood by the use of the word "telephone," we have been governed partly by the information judicially within our reach, and in other respects by the evidence. The word having become a term of art, evidence was admissible to explain its proper meaning; Greenl. Ev. sect. 280; Whart. Ev. sects. 961–972. In view of the condition of things as shown to have existed on the thirteenth day of April 1885, we feel constrained to hold that the word "telephone," as used in the act of that date, was intended to designate, and in fact really referred to an apparatus composed of all the usual and necessary instruments for the convenient and ready transmission and reception of telephonic messages, and not to a single instrument only.

There was evidence at the trial tending to prove that the Central Union Telephone Company cannot supply the facilities to Haughey provided for in its contract with him, for three dollars per month, without actual and very serious loss; and, arguing that the legislature cannot be presumed to have intended to inflict injustice upon any person or corporation, it is insisted we ought to take the company's liability to sustain a great loss, in a certain contingency, into consideration, in determining the legislative intention in enacting the statute in question in this case. This argument is largely based upon the assumption that the company was not at liberty to decline to extend its line to Haughey's farm, upon his request that such an extension should be made, and that it will be compelled to maintain such extension so long as Haughey may require it to be maintained, independently of any contract with him on the subject. This assumption is, however, not well founded. There is nothing in the act of the legislature under review, or contained in any other statutory or common-law regulation applicable to the subject to which our attention has been called, which requires a telephone company to construct a new line against its will, or to maintain an old line longer than it may feel inclined to do so, in the exercise of a legitimate business discretion. Besides, the power of the legislature to pass the act in question being conceded, this court cannot sit in judgment upon either the justice or the expediency of the enactment of such a law. If the law shall prove to be either unjust or inexpedient in its operation, whether upon persons or corporations, the appeal must be to the legislature, and not to the courts; 20 Cent. L. J. 83.

The judgment is affirmed, with costs.

Telephone cases are not numerous. The first we shall notice are those touching the companies' right to use the public highways for the stretching of their wires. In this respect telephone companies do not differ from telegraph companies, and may be subjected to the restrictions and rules that the latter are. It has been held that telegraph poles in a city should be shapely and not unsightly: *Forsythe v. B. & O. Telegraph Co.*, 12 Mo. App. 494. If erected under a statute, the city, perhaps, cannot thus regulate them: *Gay v. Mutual Union Telegraph Co.*, Id. 485. If a wire of a

telegraph company so away as to interfere with public travel, and one is injured without fault on his part, he may recover damages from the owners of the wire: *Dickey v. Maine Telegraph Co.*, 46 Me. 483; see *Young v. Yarmouth*, 9 Gray 386.

The authority given by legislatures to telegraph companies to erect poles in public streets is subject to the liability to make compensation to the adjacent land-owner for the use: *Board of Trade Telegraph Co. v. Barnett*, 107 Ill. 507; the company sought to erect poles on the highway running through the plaintiff's land;

and it was held to be an additional burden to the easement. Yet in Massachusetts exactly the opposite was held: *Pierce v. Drew*, 136 Mass. 75; although three out of seven judges dissented, and delivered an able opinion in opposition to the position taken by the majority. Following the Illinois case are the cases of *Dusenbury v. Mutual Telegraph Co.*, 11 Abb. N. C. 440; *Atlantic & Pacific Telegraph Co. v. Chicago, Rock Island & Pacific Rd. Co.*, 6 Biss. 158; *Southwestern Rd. Co. v. Southern & Atlantic Telegraph Co.*, 46 Geo. 43. Where the fee in street is in the public: *contra*, *Metropolitan Telegraph Co.*, 67 How. Pr. 365; *People v. Metropolitan Telephone & Telegraph Co.*, 31 Hun 596.

A case of some interest arose in England. The Court of Appeals in this case decided that the municipal corporation (in the particular case a local board of works), in which was vested the public street, for the purposes of keeping it open, improved and repaired as a public street, did not own the space above the street *usque ad celum*. The question was whether a statute (18 & 19 Vict. ch. 120, sec. 96), gave the board of works for a particular district of the metropolis a right to an injunction to prevent a telephone company from carrying their wires diagonally across the street at the level of the chimneys, the owner of the houses not objecting, and they not being a nuisance, nor creating appreciable dangers. The injunction was granted; but on appeal, the decision was reversed, because the board had not such an interest as entitled them to maintain the action, unless the act created a nuisance or rendered the street dangerous to the public; applying the principle of *Coverdale v. Charlton*, 48 L. J. Rep. 128. See *Board of Works v. United Telephone Co., Limited*, 51 L. T. Rep. (N. S.) 148. In Louisiana it was decided that an adjoining landowner cannot have poles removed on the ground that they are a nuisance: *Irwin v. Great Southern Tel. Co.*, 20 Reporter 174.

A case of considerable importance arose in Nebraska. In that case it was decided, that a telephone company, undertaking to supply a public demand, must serve all alike, without discrimination; that it is a common carrier of news, and all persons are entitled to equal facilities in the enjoyment of the benefits to be derived from its use; and if no good reason is assigned for a refusal by a company to furnish a telephone to a person desiring its use or a subscriber, a writ of mandamus will issue to compel the company to furnish such person with the necessary instruments, on a tender of a full compliance with all reasonable rules established for subscribers: *State v. Nebraska Telephone Co.*, 17 Neb. 126; 24 Am. L. Reg. 262.

So in Missouri, where a telegraph company applied to a telephone company for service and was refused, a writ of mandamus was issued to compel the granting of service: *American Union Telegraph Co. v. Bell Telephone Co.*, abstracted in 10 Cent. L. J. 438; and in 11 Cent. L. J. 359; 38 Am. Rep. 587; 44 Id. 241.

In Kentucky, the plaintiffs were the proprietors of public carriages, and the defendants were a telephone company that was also the proprietors of public carriages. The defendants were restrained by the Louisville Chancery Court from removing their telephone from the plaintiffs' office, and from refusing to transact the plaintiffs' telephone business, pursuant to a contract between the parties. *Louisville Transfer Co. v. Amer. Dist. Telephone Co.*, 24 Alb. L. J. 283; abstracted in 38 Am. Rep. 588; 44 Id. 242.

In the Circuit Court for the Eastern District of Missouri arose the case of *The State of Missouri ex rel. Baltimore & Ohio Telegraph Co. v. Bell Telephone*, 24 Am. L. Reg. 573. The point decided was this: A., a Massachusetts corporation, and the owner of a patent on a telephone, licensed B., a

Missouri corporation, to do the telephone business of St. Louis, upon condition that B. should not establish telephonic connection with any telegraph company unless specially authorized by A. A. permitted B. to establish telephonic connection with the Western Union Telegraph Co. Afterwards, the Baltimore & Ohio Telegraph Co. applied for a mandamus to compel B. to perform telephonic communication between it and the petitioners. A. was not made a party. It was held that A. was not a necessary party; that all other telegraph companies were entitled to the same privilege granted to the Western Union Telegraph Co., upon paying the same price; and that the petitioner was entitled to the relief asked. The chief point made was that it could not discriminate between patrons.

In Ohio a statute provided that telegraph companies should receive dispatches from and for other telegraph lines, and from and for individuals, and transmit them with impartiality and good faith. A contract between a telephone company and the owner of a telephone instrument, providing that the company in the use of the instruments should discriminate as between telegraph companies, was held void as against public policy. It was further held that, although the telephone was a patented article, it was devoted to public use, and was subject to control by state legislation where the public welfare demanded it: *State v. Telephone Company*, 36 Ohio 296; see *Public Grain & Stock Exchange v. Western Union Telegraph Co.*, 16 Fed. Rep. 289—a telegraph case.

A case somewhat similar was before the Supreme Court of Connecticut. The defendant was a Connecticut telephone company, and had purchased from a Massachusetts telephone company owning the patent, the right to use its magnetic telephone system, for a certain

period, on the condition that it should not permit telegraph companies to use the system, unless they had purchased the right from the Massachusetts company. A statute of Connecticut provided that every telephone company should impartially permit persons and corporations to transmit speech through its wires by its instruments. The plaintiffs, a telegraph company in Connecticut, not having purchased the right, sued to compel the defendants to permit it to use the system. The action was held not maintainable: *American Rapid Telegraph Co. v. Connecticut Telephone Co.*, 49 Conn. 352.

For a case involving the rights of the Bell patent and the Drawbaugh patent, see 25 Fed. Rep. 725.

A second case came before the Supreme Court of Indiana, and was decided the same as the principal one: *Hackett v. State*, 5 N. E. Rep. 202.

On March 23d 1886, the same court decided that the telephone company could be compelled to furnish service to subscribers, by use of the writ of mandamus: *Telephone Company v. State*, 5 N. E. Rep. 721.

The subtle distinction sought to be drawn in this case is certainly unwarranted; and has been fairly met by the court. By the use of such distinctions, any telegraph company, or any railroad company could escape the regulations sought to be placed upon it. To allow them would not only have defeated the object of the legislature in passing the act drawn in question, but have rendered it practically, if not wholly impossible to pass an act which would cover every phase of the evil sought to be corrected by its passage. So long as it had decided to give expression to the legislative will, the court could not have decided, in this respect, any other way.

W. W. THORNTON.

Crawfordsville, Ind.

Supreme Court of the United States.

PHOENIX INSURANCE COMPANY v. ERIE AND WESTERN TRANSPORTATION COMPANY.

A stipulation in a bill of lading that the carrier shall have the benefit of any insurance on the goods is a valid one, and in such case, even though the loss be occasioned by the negligence of the carrier, the insurance company cannot be subrogated to the rights of the shipper to recover damages for such negligence.

If, as is well settled, a carrier may insure against loss, though occasioned by the negligence of his own employees, he may also lawfully stipulate with the owner of goods to be allowed the benefit of insurance voluntarily obtained by the latter.

Where goods were shipped under an oral agreement, with the understanding that bills of lading would be subsequently issued, and afterwards and after the effecting of insurance by the shipper, bills of lading were issued containing a provision giving to the carrier the benefit of any insurance on the goods, which bills were not objected to by the shipper, and were similar to bills previously issued to him on other shipments, the contract of carriage is to be treated as if made on the day of the oral agreement and the insurance company claiming to be subrogated to the rights of the shipper is bound by the conditions of the bill of lading.

APPEAL from the Circuit Court of the United States, for the Eastern District of Wisconsin.

This was a libel in admiralty against a common carrier by an insurance company, which had insured the owners upon the goods carried, and had paid them the amount of the insurance and claimed to be subrogated to their rights against the carrier. The defence relied on was that by a provision of the contract of carriage, the carrier was to have the benefit of any insurance upon the goods. The district court held that this provision was valid, and therefore no right of subrogation accrued to the libellant, and entered a decree accordingly. The libellant appealed to the Circuit Court, which found the following facts: The respondent was a Pennsylvania corporation, authorized to carry on the business of lake transportation, and engaged in business as a common carrier, and owned a line of propellers running between Erie and other ports on the lakes, called the "Anchor Line," one of which propellers was the "Merchant." On July 24th 1874, the firms of A. M. Wright & Co., owners of 16,325.34 bushels of corn, worth \$8000; Elmendorf & Co., owners of 800 bushels of corn, worth \$600, and Gilbert Wolcott & Co., owners of 370 bushels of corn, and 689 bushels of oats, together, worth \$800, caused to be shipped on board the propeller Merchant, then lying at Chicago, and bound for Erie, the grain aforesaid, consigned to themselves at other places beyond; and severally made oral agreements with the respondent, by which, in consideration of

certain stipulated freight, the respondent agreed to transport the several parcels of grain from Chicago, by way of the lakes, to Erie, and thence forward them to their ultimate destinations ; and it was tacitly understood that bills of lading for the shipments would be subsequently issued to the shippers, but nothing whatever was said respecting the terms and conditions thereof. After the goods had been received on board, and the propeller had departed on her voyage, the respondent delivered to the shippers, respectively, bills of lading, each of which described the goods as shipped on the propeller Merchant, and addressed to the owners by name at their ultimate destination, fixed the rate of freight from Chicago to that destination, and contained an agreement that the goods should be "transported by the Anchor line, and the steamboats, railroad companies, and forwarding lines with which it connects, until the said goods shall have reached the point named in the bill of lading, on the following terms and conditions," among which were these :

"The said Anchor line, and the steamboats, railroad companies, and forwarding lines with which it connects, and which receive said property, shall not be liable " "for loss or damage by fire, collision, or the dangers of navigation while on seas, bays, harbors, rivers, lakes, or canals ; and where grain is shipped in bulk, the said Anchor line is hereby authorized to deliver the same to the Elevator Company at Erie, as the agent of the owner and consignee, for transshipment (but without further charge to such owner and consignee) into the cars of the connecting railroad companies or forwarding lines ; and when so transhipped in bulk, the said Anchor Line and the said connecting railroad company or carrier shall be and is, in consideration of so receiving the same for carriage, hereby exempted and released from all liability for loss, either in quantity or weight, and shall be entitled to all other exemptions and conditions herein contained.

"It is further agreed that the Anchor line, and the steamboats, railroads and forwarding lines with which it connects, shall not be held accountable for any damage or deficiency in packages, after the same shall have been receipted for in good order by consignees or their agents, at or by the next carrier beyond the point to which this bill of lading contracts.

"It is further stipulated and agreed that in case of any loss, detriment or damage done to or sustained by any of the property herein receipted for, during such transportation, whereby any legal

liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment, or damage; and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods.

“And it is further agreed that the amount of the loss or damage so accruing, so far as it shall fall upon the carriers above described, shall be computed at the value or cost of said goods or property at the place and time of shipment under this bill of lading.”

These bills of lading were received by the shippers, without protest or objection, and were signed by Elmendorf & Co., and by Wolcott & Co., but not by A. M. Wright & Co. The bills of lading were received by the shippers without specially reading the terms and conditions, their attention was not directed to them, nor was anything said respecting them; and no reduction of freight from the rates stipulated in the oral agreement was made in consequence of those terms and conditions, or other consideration paid therefor; but the shippers had often before shipped goods by this line under similar contracts, and thereby knew, or had every opportunity of knowing, the contents of these bills of lading. The propeller completed the lading of the goods during the evening of July 24th 1874, and about midnight departed on her voyage. About 10 o'clock the next morning, in a dense fog, she was stranded on the western shore of Lake Michigan, about 10 miles south of Milwaukee, through the negligence of those managing her, and immediately filled with water, and all the grain became wet and damaged. One thousand two hundred bushels of it were thrown overboard to get off the vessel, and 5188 bushels were brought into Milwaukee in a perishable condition, and were there sold for the sum of \$1037.60, which was retained by the respondent. On said twenty-fourth of July, the libellant, a New York corporation, authorized to transact a general lake and insurance business, insured the shippers, at their request and expense, against loss or damage to these shipments from perils of the seas and other perils; and issued to them certificates of insurance, for \$8000, \$520, and \$700, respectively, in this form: “No. 627. THE PHOENIX INSURANCE COMPANY, NEW YORK. \$8000.

“Chicago, July 24th 1874.

“This certifies that A. M. Wright & Co. [are] insured, under and subject to the conditions of open policy No. 2263 of the Phoenix

Insurance Company, in the sum of eight thousand dollars, on corn on board the propeller Merchant, at and from Chicago to Erie. Loss payable to assured, order hereon, and return of this certificate.

CHAS. E. CHASE, Agent."

The policy of insurance referred to in these certificates issued "Charles E. Chase, on account of whom it may concern," "lost or not lost, at and from ports and places to ports and places, on cargo, premiums to be settled monthly, upon all kinds of lawful goods and merchandise laden or to be laden on board" any vessel or vessels; and was otherwise in the usual form of an open policy of insurance for \$1,000,000 against marine risks, including perils of the seas, "barratry of the master and mariners, and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, or any part thereof;" and contained these provisions: "The company are to be entitled to premium at their usual rates on all shipments, reported or not. It is warranted by the assured to report every shipment on the day of receiving advices thereof, or as soon thereafter as may be practicable, when the rate of premium shall be fixed by the president or the vice-president of the company." "No shipment to be considered as insured until approved and endorsed on this policy, by C. E. Chase, agent." The shipments were duly approved and endorsed on this policy. On August 19th 1874, the shippers abandoned the goods to the libellant as a total loss, by written instruments, substantially alike, the material part of the one executed by A. M. Wright & Co., being as follows:

"Chicago, August 19th 1874.

"For and in consideration of the sum of eight thousand dollars, the receipt whereof is hereby acknowledged, we do by these presents assign, transfer, cede, and abandon to the Phoenix Insurance Company all our right, title, and interest in and to the property hereinafter specified, and to all that can or may in any way be made, saved or realized from the damage or loss reported to have occurred by reason of which a claim of payment has been made by us, with full power to take and use all lawful ways and means (at the risk and expense of the Phoenix Insurance Company) to make, save, and realize the said property to wit, 16,825.34 bushels of corn, as per bill of lading and invoice, shipped on board the propeller Merchant, bound from Chicago for Erie, and covered by insurance with the

Phoenix Insurance Company by open policy No. 2263, certificate No. 627, under date of July 24th 1874."

In consequence thereof the libellant paid to the shippers the amount of the insurance as and for a constructive total loss. A general average adjustment was made on September 2d 1874, and readjusted on February 1st 1875, awarding to the libellant the sum of \$2466.12 on account of these shipments.

The Circuit Court made and stated the following conclusions of law: (1) That the bills of lading were the contract by which the rights of the parties were to be governed; (2) that under them the respondent became liable to the shippers for the value of the shipments, by reason of the negligent loss of the same, and that the shippers had rights of action therefor; (3) that by the abandonments the libellant did not succeed to those rights of action of the shippers by reason of the stipulation contained in the bills of lading that "the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods;" (4) that the libellant was entitled to recover the sum of \$2466.12, awarded to it in the general average adjustment, readjusted as aforesaid, with interest thereon.

The Circuit Court entered a decree for the libellant for this sum only, and the libellant appealed to this court.

Geo. A. Black and *Geo. D. Van Dyke*, for appellant.

Geo. B. Hibbard, for appellee.

The opinion of the court was delivered by

GRAY, J.—It being found as matter of fact that the lading of the goods on board the propeller was not completed until the evening of the twenty-fourth of July, that she departed on her voyage about midnight, and that the bills of lading were not delivered by the carrier to the shippers until after her departure, it is clear that the bills of lading were not actually delivered until the 25th. But it being also found that oral agreements for the carriage were made on the 24th, with the understanding that bills of lading would be subsequently issued, and that the shippers having often before shipped goods by this line under similar bills of lading, knew or had every opportunity of knowing their terms and conditions, it is also clear that the bills of lading were but a putting in form of the oral agreements made on the 24th, and took effect as if they had been delivered and accepted on that day. The certificates of the agent

of the insurance company, without which the policy of insurance did not attach to these goods, were also made on that day, and described the goods as on board the propeller. The contract of carriage and the contract of insurance must therefore be treated as substantially contemporaneous, and both made before the loss of the goods. There is nothing to show any misrepresentation or intentional concealment by the assured in obtaining the insurance, or that the insurer had or had not knowledge or notice of the usual form of the bill of lading. The policy of insurance contains no express stipulation for the assignment to the insurer of the assured's right of action against third persons. In the bills of lading, it is expressly stipulated that the carriers whose railroad or vessels form part of the line of transportation shall not be liable for loss or damage by fire, collision, or dangers by navigation; and that each carrier shall be liable only for a loss of the goods while in its custody, "and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods."

The question is whether, under the circumstances the insurer, upon payment of a loss, became subrogated to the right to recover damages from the carrier.

When goods insured are totally lost, actually or constructively, by perils insured against, the insurer, upon payment of the loss, doubtless becomes subrogated to all the assured's rights of action against third persons who have caused or are responsible for the loss. No express stipulation in the policy of insurance, or abandonment by the assured, is necessary to perfect the title of the insurer. From the very nature of the contract of insurance as a contract of indemnity, the insurer, when he has paid to the assured the amount of the indemnity agreed on between them, is entitled, by way of salvage, to the benefit of anything that may be received, either from the remnants of the goods, or from damages paid by third persons for the same loss. But the insurer stands in no relation of contract or of privity with such persons. His title arises out of the contract of insurance and is derived from the assured alone, and can only be enforced in the right of the latter. In a court of common law it can only be asserted in his name, and, even in a court of equity or of admiralty, it can only be asserted in his right. In any form of remedy, the insurer can take nothing by subrogation but the rights of the assured: *Comegys v. Vasse*, 1 Pet. 193, 214; *Eretz v. Bull*, 12 How. 466, 468; *The Monticello*, 17 Id. 152, 155; *Garrison*

v. *Memphis Ins. Co.*, 19 Id. 312, 317; *Hall v. Railroad Co.*, 13 367, 370, 371; *The Potomac*, 105 U. S. 630, 634, 635; *Mobile & M. Ry. v. Jurey*, 111 Id. 584, 594; *Clark v. Wilson*, 103 Mass. 219; *Simpson v. Thompson*, 3 App. Cas. 279, 286, 292, 293. That the right of the assured to recover damages against a third person is not incident to the property in the thing insured, but only a personal right of the assured, is clearly shown by the fact that the insurer acquires a beneficial interest in that right of action, in proportion to the sum paid by him, not only in the case of a total loss, but likewise in the case of a partial loss, and when no interest in the property is abandoned or accrues to him: *Hall v. Railroad Cos.*, *The Potomac*, and *Simpson v. Thompson*, above cited.

The right of action against another person, the equitable interest in which passes to the insurer, being only that which the assured has, it follows that if the assured has no such right of action none passes to the insurer, and that if the assured's right of action is limited or restricted by lawful contract between him and the person sought to be made responsible for the loss, a suit by the insurer, in the right of the assured, is subject to like limitations or restrictions. For instance, if two ships owned by the same person, come into collision by the fault of the master and crew of the one ship, and to the injury of the other, an underwriter who has insured the injured ship, and received an abandonment from the owner, and paid him the amount of the insurance as and for a total loss, acquires thereby no right to recover against the other ship because the assured, the owner of both ships could not sue himself: *Simpson v. Thompson*, above cited; *Globe Ins. Co. v. Sherlock*, 25 Ohio St. 50, 68.

Upon the same principle, any lawful stipulation between the owner and the carrier of goods, limiting the risks for which the carrier shall be answerable, or the time of making the claim, or the value to be recovered, applies to any suit brought in the right of the owner, for the benefit of his insurer, against the carrier, as, for instance, if the contract of carriage expressly exempts the carrier from liability for losses by fire (*York Co. v. Central Rd.*, 3 Wall. 107), or requires claims against the carrier to be made within three months (*Express Co. v. Caldwell*, 21 Id. 264), or fixes the value for which the carrier shall be responsible (*Hart v. Pennsylvania Rd. Co.*, 112 U. S. 331). So the stipulation, not now in controversy, in the bills of lading in the present case, making the value of the goods at the place and time of shipment, the measure of the carrier's

liability, would control, although in the absence of such a stipulation the carrier would be liable for the value at the place of destination, as held in *Mobile & M. Ry. v. Jurey*, 111 U. S. 584.

The stipulation in these bills of lading that carriers "shall not be liable for loss or damage by fire, collision or the dangers of navigation," clearly does not protect them from liability for any loss occasioned by their own negligence. By the settled doctrine of this court, even an express stipulation in the contract of carriage that a common carrier shall be exempt from liability for losses caused by the negligence of himself and his servants, is unreasonable and contrary to public policy, and therefore void: *Railroad Co. v. Lockwood*, 17 Wall. 357; *Railroad Co. v. Pratt*, 22 Id. 123; *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174; *Railway Co. v. Stevens*, 95 Id. 655. And it may be that, as held by Judge WALLACE in a case in the Circuit Court, a stipulation that "no damage that can be insured against will be paid for," would not protect the carrier from liability for his own negligence, because that would be to compel the owners of the goods to insure against the negligence of the carrier: *The Hadji*, 22 Blatchf. 235. But the stipulation upon the subject of insurance, in the bills of lading before us is governed by other considerations. It does not compel the owner of the goods to stand his own insurer, or to obtain insurance on the goods; nor does it exempt the carrier in case of loss by negligence of himself or his servants, from liability to the owner, to the same extent as if the goods were uninsured. It simply provides that the carrier, when liable for the loss, shall have the benefit of any insurance effected upon the goods.

It is conclusively settled, in this country and in England, that a policy of insurance, taken out by the owner of a ship or goods, covers a loss by perils of the sea or other perils insured against, although occasioned by the negligence of the master or crew or other persons employed by himself: *Waters v. Merch. Louisville Ins. Co.*, 11 Pet. 213; *Copeland v. New England Ins. Co.*, 2 Met. 432; *Gen. Ins. Co. v. Sherwood*, 14 How. 351, 366; *Davidson v. Burnand*, L. R., 4 C. P. 117, 121. Any one who has made himself responsible for the safety of goods has a sufficient interest in them to enable him to insure them. Contracts of reinsurance, by which one insurer causes the sum which he has insured to be reassured to him by a distinct contract with another insurer, with the object of indemnifying himself against his own responsibility (though pro-

hibited for a time in England by statute), are valid by the common law, and have always been lawful in this country; and in a suit upon such a contract the subject at risk, and the loss thereof, must be proved in the same manner as if the original assured were the plaintiff: 3 Kent Com. 278, 289; *Sun Ins. Co. v. Ocean Ins. Co.*, 107 U. S. 485; *Mackenzie v. Whitworth*, L. R., 10 Exch. 142, and 1 Exch. Div. 36. So a common carrier, a warehouseman, or a wharfinger, whether liable by law or custom to the same extent as an insurer, or only for his own negligence, may, in order to protect himself against his own responsibility, as well as to secure his lien, cause the goods in his custody to be insured to their full value, and the policy need not specify the nature of his interest: *Crowley v. Cohen*, 3 B. & Ad. 478; *De Forrest v. Fulton Ins. Co.*, 1 Hall 94, 110; *Waters v. Monarch Ass. Co.*, 5 E. & B. 870; *London & N. W. Ry. v. Glyn*, 1 Id. 652; *Savage v. Corn Exch. Ins. Co.*, 36 N. Y. 555; *Joyce v. Kennard*, L. R., 7 Q. B. 78; *Com. v. Shoe & Leather Ins. Co.*, 112 Mass. 131; *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527; *N. B. Ins. Co. v. London L. & G. Ins. Co.*, 5 Ch. Div. 569.

No rule of law or of public policy is violated by allowing a common carrier, like any other person having either the general property or a peculiar interest in goods, to have them insured against the usual perils, and to recover for any loss from such perils, though occasioned by the negligence of his own servants. By obtaining insurance, he does not diminish his own responsibility to the owners of the goods, but rather increases his means of meeting that responsibility. If it were true that a ship-owner, obtaining insurance by a general description upon his ship and the goods carried by her, could, in case of the loss of both ship and goods, by perils insured against, and through the negligence of the master and crew, recover of the insurers for the loss of the ship only, and not for the loss of the goods, some trace of the distinction would be found in the books. But the learning and research of counsel have failed to furnish any such precedent. On the contrary, in one of the earliest cases in which the rule that a policy of insurance covers losses by perils insured against, though occasioned by the negligence of the servants of the assured, was judicially affirmed, the assured, being the owner of a ship, had chartered her for a West India voyage, and by the usages of trade bore the risk of bringing the cargo from the shore to the ship. The policy was upon the boats of the ship, and

upon goods in them; and the amount recovered of the insurer was for goods being carried from the shore to the ship in her boats, and lost by the wrecking of the boats in consequence of the misconduct and negligence of some of the ship's crew. Such was the state of facts to which Lord Chief Justice ABBOTT applied the language, cited and approved by Mr. Justice STORY in *Waters v. Merch. Louisville Ins. Co.*, 11 Pet. 222, and by Chief Justice SHAW in *Copeland v. N. E. Ins. Co.*, 2 Metc. 442: "In this case the immediate cause of the loss was the violence of the winds and waves. No decision can be cited where, in such a case, the underwriters have been held to be excused in consequence of the loss having been remotely occasioned by the negligence of the crew. I am afraid of laying down any such rule; it will introduce an infinite number of questions as to the *quantum* of care which, if used, might have prevented the loss. Suppose, for instance, the master were to send a man to the mast-head to look out, and he falls asleep, in consequence of which the vessel runs upon a rock, or is taken by the enemy, in that case it might be argued, as here, that the loss was imputable to the negligence of one of the crew, and that the underwriters were not liable. These and a variety of other such questions would be introduced, in case our opinion were in favor of the underwriters:" *Walker v. Maitland*, 5 B. & Ald. 171, 174, 175. So, in the recent case of *N. B. Ins. Co. v. London, L. & G. Ins. Co.*, it was assumed as unquestionable that insurance obtained by a wharfinger would cover a loss by his own negligence: 5 Ch. Div. 584.

As the carrier might lawfully himself obtain insurance against the loss of the goods by the usual perils, though occasioned by his own negligence, he may lawfully stipulate with the owner to be allowed the benefit of insurance voluntarily obtained by the latter. This stipulation does not, in terms or in effect, prevent the owner from being reimbursed the full value of the goods; but, being valid as between the owner and the carrier, it does prevent either the owner himself, or the insurer, who can only sue in his right, from maintaining an action against the carrier upon any terms inconsistent with this stipulation.

Nor does this conclusion impair any lawful rights of the insurer. His right of subrogation, arising out of the contract of insurance and payment of the loss, is only to such rights as the assured has, by law or contract, against third persons. The policy containing

no express stipulation upon the subject, and there being no evidence of any fraudulent concealment, or misrepresentation by the owner in obtaining the insurance, the existence of the stipulation between the owner and the carrier would have afforded no defence to an action on the policy, according to two careful judgments rendered in June last, and independently of each other, the one by the English Court of Appeal, and the other by the Supreme Judicial Court of Massachusetts: *Tate v. Hyslop*, 15 Q. B. Div. 368; *Jackson Co. v. Boylston Ins. Co.*, 139 Mass. 508.

In *Tate v. Hyslop*, owners of goods, insured against risks in crafts or lighters, had previously agreed with a lighterman that he should not be liable for any loss in crafts except loss caused by his own negligence, and did not disclose this agreement to the underwriters at the time of procuring the insurance. The sole ground on which it was held that the owners could not recover on the policy was that this agreement was material to the risk, because the underwriters, as the assured knew, had previously established two rates of premium, depending on the question whether they would have recourse over against the lighterman. Lord Justice BRETT observed that, but for the two rates of premium established by the underwriters and known to the assured, the omission of the assured to disclose their agreement with the lighterman could only have effected the amount of salvage which the underwriters might have, and would have been immaterial to the risk, and consequently to the insurance: 15 Q. B. Div. 375, 376.

In *Jackson Co. v. Boylston Ins. Co.* it was adjudged that, in the absence of any fraud or intentional concealment, the undisclosed existence of a stipulation between the assured and the carrier, like that now before us, afforded no defence to an action on the policy.

It may be added that our conclusion accords with the decision of Judge SHIPMAN in *Rintoul v. N. Y. Cent. Rd.*, 21 Blatchf. 439; (s. c. 23 Am. Law Reg. N. S. 294, and note), as well as with those of Judge DYER in the District Court, and Judge DRUMMOND in the Circuit Court, in the present case. 10 Biss. 18, 38. See, also, *Carstairs v. Mech. & Tr. Ins. Co.*, 18 Fed. Rep. 473; *The Sidney*, 23 Fed. Rep. 88; *Mercantile Ins. Co. v. Calebs*, 20 N. Y. 173.

Decree affirmed.

BRADLEY, J., dissented.

LEGAL NOTES.

THE recent cases of *Hanley v. Donoghue*, 116 U. S. S. C., 1, and *Renaud v. Abbott*, Id. 277, while not passing upon the question, serve to recall the diversity of opinion, evidenced by the decisions of the various state courts, in regard to whether a judgment rendered jointly against two defendants, one only of whom is summoned, and which is allowed to remain unappealed from, is void as against the *summoned* defendant. This subject was so recently considered in an article by Mr. Frederick J. Brown, of Baltimore, published in *Am. Law Reg. (N. S.)*, vol. xix., p. 673, that we desire simply to call attention to the elaborate and careful note since written by Mr. A. C. Freeman to *St. John v. Holmes*, 32 *Am. Dec.* 604, in which he reviews the cases and examines the ground of the decisions. His conclusions, which agree with those previously reached by Mr. Brown, are thus emphatically expressed: "The authorities show that the courts of Massachusetts, Maine and New Hampshire are fully, and, perhaps, unalterably committed to the doctrine that a judgment is an entirety, and if void against one of the defendants is void as to all. * * * We believe it to be without any other support than the authority of those eminent courts, which, through what we conceive to be either a misapprehension of a prior decision, or of the real nature of the question in issue, pronounced in its favor. We say misapprehension of the question in issue, because the courts seemed to treat it as a mere question of error and not of power, and to assume that if error was shown the judgment was void."

This is significant, not only on account of Mr. Freeman's authority to speak on such a question, but because the learned author, in sect. 136, of his work on Judgments, had previously endorsed the contrary view.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹SUPREME COURT OF FLORIDA.²COURT OF ERRORS AND APPEALS OF MARYLAND.³SUPREME COURT OF NORTH CAROLINA.⁴SUPREME COURT OF RHODE ISLAND.⁵

AGENT.

Contract to Sell Land as Agent for Feme Covert—Real Ownership of Agent—Fraudulent Conveyance to Principal.—A contract to sell a

¹ Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term, 1885. The cases will probably appear in 117 U. S. Rep.

² From D. C. Wilson, Esq., Clerk. The cases will probably appear in 21 or 22 Florida Rep.

³ From J. Shaaf Stockett, Esq., Reporter; to appear in 64 Md. Rep.

⁴ From Hon. Theo. T. Davidson, Reporter; to appear in 94 N. C. Rep.

⁵ From Arnold Green, Esq., Reporter; to appear in 15 R. I. Rep.

tract of land, purporting to belong to a *feme covert*, was made by one who acted as her agent: It was *held*, that the contract was not binding on the *feme*, 1st, because of her coverture, and 2d, because the agent was not authorized by an instrument under seal to make the contract. Such contract is not binding on the agent, because its terms do not purport to bind him: *Boyd v. Turpin*, 94 N. C.

A son conveyed his land to his mother, a *feme covert*, for the purpose of defrauding his creditors, and afterwards contracted in her name and as her agent to sell the land to a *bonâ fide* purchaser. After a portion of the purchase-money had been paid, the mother attempted to repudiate the contract, and brought an action to recover the possession of the land: *Held*, that she cannot be permitted to hold the land for which she paid nothing, and at the same time disown the authority of the agent who assumed to act for her. She must either surrender the land to him, or abide by his disposition of it. The disability of coverture carries with it no license to practice a fraud: *Id.*

In such case, a court of equity looks through the disguises which cover the transaction, and charges the legal estate with a trust, which while it cannot be enforced by the fraudulent donee, may be by those who, in good faith, deal with him as possessed of authority to make the contract of sale: *Id.*

AMENDMENT. See Judgment.

Joining Causes of Action—Action to Recover Land—Statute of Limitation—Mistake—Correction.—The court cannot, except by consent, allow an amendment which changes the pleadings so as to make it substantially a new action, but an amendment which only adds to the original cause of action is not of this nature, and may be allowed: *Ely v. Early*, 94 N. C.

In an action to recover land, the court may allow an amendment so as to set up a mistake in a deed: *Id.*

An action to recover the possession of land, and to correct a mutual mistake in a deed for the same land, executed by the plaintiff to the defendant, constitute but one cause of action: *Id.*

Where a distinct cause of action is allowed to be inserted in a complaint, by amendment, it is tantamount to bringing a new action, and the statute of limitation runs to the time when the amendment is allowed; but this rule does not apply when the new matter allowed by the amendment constitutes a part of the original cause of action: *Id.*

So where, in an action to recover land, the court allowed the plaintiff to amend, so as to set up a mutual mistake in a deed, the statute only runs against the relief demanded by the amended complaint to the time when the action was commenced: *Id.*

A court will only correct a mistake in a deed or other written instrument, upon clear, strong and convincing proof, and it is error in the court to charge the jury that the plaintiff is entitled to have the issue found in his favor upon a mere preponderance of evidence: *Id.*

In such cases, if the court should be of opinion that, in no reasonable view of the evidence, is it sufficient to warrant a verdict establishing the mistake, a verdict should be directed for the defendant: *Id.*

In the trial by a jury of issues arising in equitable matters, the rules of equity should be followed as far as possible: *Id.*

Issues of fact, as distinguished from questions of fact, in equitable as well as legal actions, must be tried by a jury; but this does not authorize the finding of such issues on less evidence than a chancellor would find them: *Id.*

ASSIGNMENT.

For Benefit of Creditors—Reservation in.—The reservation in a deed for the benefit of creditors, of a reasonable fee for the preparation of the deed, is such a preference as is forbidden by the insolvent act: *Wolfeheimer v. Rivinus*, 64 Md.

ATTACHMENT. See *Husband and Wife*.

ATTORNEY. See *Bills and Notes*; *Exemption*.

BANK.

Depositor—Pass-book—Examination of with Returned Vouchers.—A depositor in a bank whose pass-book is written up from time to time, and the checks paid returned to him, is bound to examine the account within a reasonable time and report to the bank any errors or omissions. His silence is an admission that the entries are correct: *Leather Manufacturers' Bank v. Morgan*, S. C. U. S., Oct. Term 1885.

Where altered checks have been paid, if the bank's officers, by proper care and skill, could have detected the forgeries, it cannot receive a credit for the amount of these checks, even if the depositor omitted all examination of his account: *Id.*

The required examination of the account can be made for the depositor by a competent clerk; but if the agent who examines the account is the one who committed the forgeries, the principal must at least show that he exercised reasonable diligence in supervising the conduct of the agent: *Id.*

BILLS AND NOTES.

Bona fide Purchaser—Notice—Attorney.—If the endorsee of a negotiable instrument before its maturity, knew, or if such facts came to his knowledge, which, if inquired into, would have informed him of an equity of the maker, he takes the instrument *cum onere*: *Hulbert v. Douglass*, 94 N. C.

Where a negotiable note is secured by a mortgage, the fact that one-half the land has been released, is some evidence to charge a purchaser of the note before maturity with notice that there has been a partial payment on the note: *Id.*

If anything appears to a party calculated to attract attention or stimulate inquiry, the person is affected with knowledge of all that the inquiry would have disclosed: *Id.*

Notice to an attorney of any matter relating to the business in which he is engaged for his client, is notice to the client: *Id.*

Where an attorney sold a note to a person who was occasionally his client, and such attorney, acting for the purchaser, investigated the title to the land on which the note was secured by a mortgage, and was afterwards employed by the purchaser to bring suit on, and collect the note: It was held, to be some evidence that the attorney was acting for the purchaser in the sale of the note: *Id.*

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CONSTITUTIONAL LAW.

Statute defining Adulteration.—A statute forbidding and punishing the sale of adulterated milk provided: "In all prosecutions under this act, if the milk shall be shown upon analysis to contain more than 88 per cent. of watery fluids or to contain less than 12 per cent. of milk solids, or less than 2½ per cent. of milk fats, it shall be deemed for the purpose of this act to be adulterated" *Held*, that the provisions were constitutional: *State v. Groves*, 15 R. I.

Habeas Corpus—Power of United States Courts to Discharge on.—A Circuit Court of the United States has jurisdiction on habeas corpus to discharge from custody a person restrained of his liberty, in violation of the Constitution of the United States, although he is held under the authority of a state: *Ex parte Royall*, S. C. U. S., Oct. Term 1885.

But where a person is in custody, under process from a state court of original jurisdiction, for an alleged offence against the laws of such state and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the Circuit Court has a discretion whether it will discharge him upon habeas corpus, in advance of his trial in the court in which he is indicted; that discretion, however, to be subordinated to any special circumstances requiring immediate action. When the state court shall have finally acted upon the case, the Circuit Court has still a discretion whether, under all the circumstances, the accused, if convicted, shall be put to his writ of error from the highest court of the state, or whether it will proceed, by writ of habeas corpus, summarily to determine whether the petitioner is restrained of his liberty in violation of the Constitution of the United States: *Id.*

CONTRACT. See *Public Policy*.

Consideration—Forbearance to Sue.—A. having a *bona fide* claim against C. placed it in the hands of an attorney for collection, who exhibited it both to C. and to B., his father, and informed them of the consequences of the suit which he was instructed to institute. After this information, B. obtained a bill of sale from his son of all his property, and upon being told by A. that "he was going to send the sheriff up that day; that he was not going to stop for that bill of sale, it was all a fraud," he replied, "you keep quiet and you will get your money; I guess I am worth it." A. relying on the promise of B., left him, and called immediately to his attorney's and stopped further proceedings: *Held*, that the forbearance to sue constituted a sufficient consideration for the promise of B., and A. was entitled to recover in an action against B.: *Bowen v. Tipton*, 64 Md.

CORPORATION. See *Negligence*; *Tax*.

Purchase of Stock of another Company—Use of.—While one railroad company may have the right to acquire the stock of another company, it has no right to use its controlling influence, thus acquired, with the directors of the latter company, so as to sacrifice the interest of that company: *State v. Brown*, 64 Md.

Charters—Power to Convey Land—Ultra Vires.—Where the charter of a corporation authorizes it to purchase land for some specified purpose in the absence of evidence, it will be presumed that any land purchased

by it, was accepted for the purposes authorized by the charter: *Mallet v. Simpson*, 94 N. C.

Where the charter of a railroad company authorized it to purchase land for the purpose of procuring stone and other material necessary for the construction of the road, or for effecting transportation thereon. It was *held*, that the charter authorized the purchase of land for the purpose of getting cross-ties and fire wood: *Id.*

At common law, in the absence of any provision in the charter, a corporation has the power to acquire and hold real estate in fee. The statutes of mortmain have never been adopted in this state: *Id.*

Even if a corporation is forbidden by its charter to hold or take a title to real estate, a conveyance of land to it is not void. It is valid until vacated by a direct proceeding by the sovereign, instituted for that purpose: *Id.*

COSTS. See *Will*.

CRIMINAL LAW.

Extradition—Affidavit—Habeas Corpus.—It is immaterial whether the warrant of the governor of this state for the arrest of the fugitive from justice from another state is based on an original affidavit or a copy thereof, when either one presented to the resident governor is certified to the governor of the state where the crime was committed as being authentic: *Kurtz v. The State*, 21 or 22 Fla.

The fugitive from justice cannot on *habeas corpus* impeach the validity of the affidavit upon which the requisition was founded, if it distinctly charge the commission of a crime: *Id.*

Evidence—Threats—Reputation.—Where there is no doubt but that the prisoner began the encounter resulting in death, previous threats made by the deceased, of serious bodily harm to, or against the life of the prisoner are not admissible in evidence, though they have been communicated to the prisoner, there being no evidence of any demonstration upon the part of the deceased made at the time of the killing and apparently indicating an immediate intention of executing the threats: *Bond v. The State*, 21 or 22 Fla.

Evidence of the reputation of the deceased as a violent, quarrelsome and dangerous man in the community where he lives, is not admissible when the prisoner is the assailant, and the killing takes place under circumstances that can afford him no reasonable ground to believe himself in danger of serious bodily harm: *Id.*

DEBTOR AND CREDITOR. See *Fraud*.

Sale—Retention of Possession—Administrator—Right to Attack Fraudulent Sale.—The retention of personal property by the vendor after a sale is *prima facie* evidence of fraud, and the evidence to rebut such presumption is an explanation of the retention by showing that it is inconsistent with the deed, or is unavoidable, or is temporary, or for the reasonable convenience of the vendee: *Holliday v. McKinne*, 21 or 22 Fla.

Creditors of an intestate have their right to question the fraudulent transactions of their debtor by proper proceedings in the courts: *Id.*

The better rule is not to permit the representative of an estate to question such transactions for the benefit of creditors: *Id.*

DEED. See *Husband and Wife*.

EQUITY. See *Agent*; *Amendment*; *Fraud*.

Marshalling Assets—Lien on two Funds—Homestead.—Where one creditor is secured by a lien upon two funds, and another by a lien upon only one of them, the former will be compelled to exhaust the subject of his exclusive lien before he can resort to the other: *Pope v. Harris*, 94 N. C.

The equity to have the securities embraced in a trust for the benefit of creditors of different classes, marshalled and appropriated in exoneration of the liens of the less preferred class, is an equity against the debtor, and not against the doubly secured creditor: *Id.*

The right of the debtor to a homestead is superior to that of all creditors except so far as it may be impaired by the voluntary act of the claimant: *Id.*

ESTOPPEL. See *Mortgage*.EVIDENCE. See *Criminal Law*; *Insurance*; *Will*.

Suppression of—Secondary Proof.—Where it is shown that evidence of the indebtedness of a party to the estate of a decedent, has been suppressed or destroyed by the debtor, or some one acting in his interest, such indebtedness may be established by testimony, which, under ordinary circumstances, would be regarded as too vague and indefinite: *Love v. Dilley*, 64 Md.

Impeaching own Witness.—A party cannot impeach his own witness by proof through other witnesses of contradictory statements unless the witness is one whom the law obliges the party to call: *Hildreth v. Aldrich*, 15 R. I.

A party disappointed in his witness may, to refresh the witness' recollection, ask him if he has not made contradictory statements, but cannot prove such statements by other witnesses: *Id.*

Explanation of Telegram by Parol.—Where the question is as to the authority given by a telegram, the party to it sued, should not be permitted to testify what his intention was in sending it. Such intention, in so far as the authority conferred is concerned, is to be derived from the telegram and the entire contract between the parties: *Meinhardt v. Mode*, 21 or 22 Fla.

Where telegrams do not contain the entire contract, the other parts of it may be proved by verbal testimony, or by other writings, or by both, as in other cases where the entire contract has not been reduced to writing: *Id.*

Burnt Records—Recitals in Deeds.—Where records have been burned or destroyed, the entries in the bound volumes containing the minutes of the court are admissible in evidence to establish the regularity of the proceedings: *Hare v. Holloman*, 94 N. C.

Where land has been sold under a decree of court, and the records have been destroyed, the recitals in the deeds are evidence of the regularity of the proceedings: *Id.*

EXECUTION. See *Exemption*.EXEMPTION. See *Tax*.

Tools—Lawyers' Books.—A statute exempting from attachment the

necessary working tools of a debtor, not exceeding in value \$200, covers only tools used in manual labor, and does not cover a lawyer's law books: *Petition of Church*, 15 R. I.

Execution—Allotment—Mortgage.—A debtor is entitled to have his personal property exemption ascertained up to and immediately before the sale: *State v. Harper*, 94 N. C.

After an execution has been returned with the allotment of the personal property exemption, it becomes an estoppel, but as long as the process remains in the officer's hands, such allotment is *in fieri*, and may be corrected: *Id.*

If property belonging to the judgment debtor has been omitted by the appraisers, they have the power to correct the allotment: *Id.*

While an unregistered mortgage is not valid as to third parties, yet the lack of registration cannot subject to sale under execution, property which would be exempt if there were no mortgages: *Id.*

Burton v. Spiers, 87 N. C. 87; *Duvall v. Rollins*, 68 Id. 230; *Crummen v. Bennett*, Id. 494, cited and approved: *Id.*

EXECUTOR AND ADMINISTRATOR. See *Debtor and Creditor*; *Insurance*; *Judgment*.

FRAUD. See *Debtor and Creditor*.

Fraudulent Conveyance—Evidence of Fraudulent Intent—Burden of Proof.—No appeal lies from an order of a court of equity dismissing a petition for a rehearing: *Zimmer v. Miller*, 64 Md.

In order to justify the annulment of a deed as void under the statute of 13 Eliz., chap. 5, because made with intent to delay, hinder, or defraud the creditors of the grantor, it is necessary to prove a fraudulent intent: *Id.*

The intent with which a grantor executes a deed, must be gathered from the deed itself, and from his acts and the surrounding circumstances. And when those circumstances are of such a character, as to lead to the inference that there has been a fraudulent intent, the *onus* of disproving fraud rests on the parties to the transaction: *Id.*

HUSBAND AND WIFE.

Attachment—Married Woman as Garnishee—Default.—An attachment was laid in the hands of a married woman as garnishee, returnable before a magistrate. She failed to appear, and a judgment of condemnation was rendered against her for the amount of the debt, \$63.76, with interest and costs. Between the time the attachment was laid and the judgment was rendered, the husband of the garnishee died. On a bill filed to restrain the execution of the judgment, it was *held*, that having failed to appear, as it was her duty to do, in person, or by agent or attorney, and avail herself of any defence which she might have, whether of coverture or otherwise, she had no standing in a court of equity to obtain relief against a judgment rendered against her by her own default, in the absence of clear proof of fraud or surprise, unmixed with negligence or fault on her part: *Ahern v. Fink*, 64 Md.

Deed by Married Woman—Defective Execution and Acknowledgment—Correction of after Suit Brought.—An instrument in writing made by a married woman purporting to be a deed conveying real estate, but

without a seal, not acknowledged by her as required by statute, and in which her husband did not join, is a nullity: *Carn v. Haisley*, 21 or 22 Fla.

Such paper acquires no validity from the execution of a paper by the husband afterwards purporting to ratify said deed of the wife: *Id.*

A private examination of the wife before the proper officer is an indispensable requisite to the conveyance of her real estate. A deed of land belonging to a married woman, but not acknowledged by her until after suit commenced by her grantee for the recovery of the land described therein, cannot be introduced in evidence in said suit: *Id.*

The plaintiff cannot avail himself of a title acquired or which did not subsist in him until after he commenced suit: *Id.*

INSURANCE.

Parol Evidence to vary Policy—Assignment—Parties.—Parol evidence is incompetent to vary, explain or contradict a written instrument. So where an insurance company contracted in writing to pay a sum of money to the personal representative of the insured, parol evidence is not admissible to show that it was intended that the sum should be paid to certain of his children: *Elliott v. Whedbee*, 94 N. C.

Where the by-law of an insurance company allowed the holder of a policy to designate the beneficiaries, by endorsing on the back of the policy the names of such beneficiaries, which endorsement was to be signed and witnessed: It was *held*, that a designation could not be made by the insured, by merely writing the names of the beneficiaries in the blank prepared on the policies for that purpose, but without signing it: *Id.*

Where a policy of insurance is payable to the personal representative of the deceased, his administrator may maintain an action for the money, against some of the next of kin who have received it: *Id.*

Where, in such case, the amount of the policy has been paid to some of the next of kin of the insured, and the administrator sues them to recover the amount, if the estate is solvent, and the money is not needed for the payment of debts, the defendants are entitled to retain their distributive shares, and the administrator can only recover the excess: *Id.*

INTOXICATING LIQUOR.

Illegal keeping for Sale.—A., duly licensed to sell liquors in Providence, sent liquors in bulk to B., in Hopkinton, where no licenses were granted, with the agreement that they should remain the property of A., but that B. might draw ten gallons at a time as he wished, paying therefor when drawn: *Held*, that A. was illegally keeping for sale and selling liquor in Hopkinton, and that the liquors were properly seized and were forfeited to the state: *In re Liquors of Young*, 15 R. I.

JUDGMENT.

Amendment of.—The rule is settled that a judgment rendered at one term, may be amended at a subsequent term, *nunc pro tunc*, when from an inspection of the record in the cause, it is apparent that the proposed amendment would have been a part of the original judgment, or that the original judgment would have been in accordance therewith, had it not have been for the inadvertence of the court or an error or omission of the clerk. *Adams v. Regua*, 21 or 22 Fla.

When a suit is brought against an administrator of an estate, and judgment rendered adding only after his name "administrator of estate of J. S. Adams," and the whole record shows that the suit was based on a claim or demand against the deceased person of whose estate the defendant is administrator, the court will, on motion, at a subsequent term, permit the record to be amended so as to show that the defendant was sued, and judgment rendered against him "as administrator of J. S. Adams, deceased : " *Id.*

LEGACY. See *Set-off*.

LIMITATIONS, STATUTE OF. See *Amendment*.

MANDAMUS.

Return to—Affidavit—Illegal Purpose.—The allegations of a return or an answer to an alternative writ of mandamus, should be stated positively, and not upon information and belief: *State v. County Com.*, 21 or 22 Fla.

The rules requiring pleas to be sworn to, does not restrict a defendant to pleading matter of defence which are within his personal knowledge. The affidavit is required as an evidence of the pleader's good faith in setting up the defence: *Id.*

A mandamus will not issue to enable a person to effect an illegal purpose, *e. g.*, to compel the county commissioners to issue a permit to sell liquors under chapter 3416, to one whose purpose is to transfer the same, and a license to be issued by the collector of revenue, to another who has not complied with such statute; and to thereby enable him to carry on the business of a liquor dealer unlawfully: *Id.*

MISTAKE. See *Amendment*.

MORTGAGE.

Absence of Seal—Notice—Demurrer—Estoppel.—A. made a loan of money to B., and received B.'s note, accompanied by a paper signed by B. and his wife, acknowledged and recorded, and which would have been a valid mortgage had it been sealed. C. attached B.'s interest in the realty described in the paper, whereupon A. filed a bill in equity against B. and his wife, and C., charging accident and mistake as the cause of the paper not being sealed; actual notice of the paper on the part of C., and praying that the paper might be reformed by affixing seals. C. demurred to the bill; *held*, that the demurrer must be overruled: *Bullock v. Whipp*, 15 R. I.

A man cannot allow another to part with money on the faith of a conveyance, and then taking advantage of some defect known to himself, claim to have acquired by a subsequent conveyance, a title better in equity than that obtained by such other: *Id.*

Partnership—Execution by one Member of Firm—Reservation of right of Mortgagees to sell Property without accounting.—An instrument executed by one member of a partnership, in the firm name, and legally binding upon the partnership and entitled to be recorded under the registry statutes of Florida, may be admitted to record upon the acknowledgment of the partner who executed it: *McCoy v. Boley*, 21 or 22 Fla.

A mortgage duly recorded is not void as between the parties to it, or

as to a third person, whose claim is not based on a valuable consideration, from the fact that it permits the mortgagor to sell personal property covered by it without accounting to the mortgagees for the proceeds: *Id*

Vague Description—Entire Crop.—The sale or mortgage of a crop to be planted, as well as one planted and in process of cultivation, is valid—provided the place where the crop is to be produced is designated with certainty sufficient to identify it. It seems, parol testimony is competent to fit the description to the property, and show the agreement of the parties: *Rountree v. Britt*, 94 N. C.

A mortgage conveying "my entire crop of every description," is too vague to pass any title to the property mentioned: *Id*.

NEGLIGENCE.

Railroad—Trespass—Child—Corporation—Charter—Demurrer.—A young child strayed from its home on to a railroad track, crossed the track and fell into an adjoining trench. The track was not fenced on the trench side. In an action against the railroad company for damages, the plaintiff child claimed that its fall was caused by the company's negligence in not fencing the track on the side of the trench; *held*, on demurrer to the declaration, that the company was as to the plaintiff under no obligation so to fence its tracks that the plaintiff could not get from them on to the adjoining land. *Held, further*, that the action could not be maintained: *Morrissey v. Providence & Worcester Rd. Co.*, 15 R. I.

On demurrer to a declaration against a corporation, the charter of the corporation is not before the court: *Id*.

Contributory Negligence—When a Question of Law for the Court.—Ordinarily the question of contributory negligence is a question of fact for a jury, under instructions from the court, but when there is no contradiction in the evidence, and the facts are undisputed, and the conclusion and inference to be drawn from it, is indisputable, involving only a common instinct of mankind—self-preservation—it becomes a question of law: *Id*.

When a person voluntarily walks on and along the track of a railroad laid in a public thoroughfare, which he knew was used as a switch-yard on which locomotives were passing to and fro, night and day, where the walking on either side of said track was as good as on the track, and is doing so is run over by a passing train and killed, he has, by the failure to exercise ordinary care and prudence, directly contributed to his own misfortune, and his representative cannot recover from the company using said track, damages therefor: *Id*.

NOTICE. See *Bills and Notes*.

PARTNERSHIP. See *Mortgage*.

PAYMENT.

When Voluntary—Protest—Taxes.—An action will not lie to recover the amount of taxes illegally assessed and voluntarily paid: *Dunnell Mfg. Co. v. Newell*, 15 R. I.

A tax is not paid under compulsion merely because the collector holds a warrant to collect it by levy or distress, but if paid under protest a tax illegally assessed may be recovered: *Id*.

PUBLIC POLICY.

Wager—Stakeholder—Recovery of Money Deposited.—A. deposited with a stakeholder the amount of his wager on a match at pool between C. and D. While the games were playing, but after it was clear that A. would lose, A. denounced the match to the stakeholder as a fraud, and notified the stakeholder not to pay the money over. At the close of the match the stakeholder paid over the amount to the winner of the wager; whereupon A. sued the stakeholder for his deposit: *Held*, that A. should recover: *McGrath v. Kennedy*, 15 R. I.

RAILROAD. See *Negligence*.

RECEIVERS.

Compensation—Allowance of—How Payable.—The rule for compensating receivers is not of the same invariable character as that governing in the case of trustees; but the allowance to receivers of insolvent corporations or private partnerships, in all cases not attended with peculiar circumstances requiring an augmentation should be regulated by analogy, as near as possible, to the rate of commissions allowed to guardians and trustees for the performance of like or kindred services. And whatever rate of compensation under this rule may be allowed, the order making the allowance should be definite, that it may not be doubtful upon what basis or for what services the particular allowance is made: *Tome v. King*, 64 Md.

Where receivers are appointed solely at the instance and for the benefit of the second mortgage bondholders, and the trustees who sold the property were appointed to sell exclusively for the same parties, and not for the benefit of the first mortgage bondholders, upon no principle of justice or reason, can the first mortgage bondholders be assessed to pay the commissions and other expenses allowed, or any part of them, to such receivers and trustees: *Id.*

If the fund in court be not sufficient to afford adequate compensation and indemnity to the receivers, the parties at whose instance they were put upon the property, should be required to provide the means of payment: *Id.*

REMOVAL OF CAUSES.

The mere filing a petition for the removal of a suit that is not removable does not work a transfer. To accomplish this, the suit must be one that may be removed, and the petition must show a right in the petitioner to demand the removal: *Stone v. State of South Carolina*, S. C. U. S., Oct. Term 1885.

If the state court proceeds after a petition for removal, it does so at the risk of having its final judgment reversed, if the record on its face shows that when the petition was filed, that court ought to have given up its jurisdiction: *Id.*

There is no statute which authorizes the removal of a suit between a state and citizens on account of citizenship, for a state cannot, in the nature of things, be a citizen of any state: *Id.*

Where the money sued for was received by the defendants as partners, and they are liable jointly for its payment, if they are liable at all, such a case is not removable unless all the partners on one side of the controversy unite in the petition for removal: *Id.*

Separate Controversy—Creditor's Bill.—A bill filed by a judgment-creditor to marshal liens and obtain a sale of debtor's property free of encumbrance to pay his judgment after satisfying all prior claims, and in the meantime to have a receiver appointed, raises but a single cause of action which is indivisible. Though each of the lien-holders may have a separate defence, this does not create "separate controversies" within the meaning of the removal act: *Fidelity Co. v. Huntingdon*, S. C. U. S., Oct. Term 1885.

Ejectment against a Tenant—Admission of Landlord with same Citizenship as Plaintiff as Defendant.—An action of ejectment was brought in a court of Missouri, by citizens of Pennsylvania, against a citizen of Missouri, and removed to the United States Circuit Court of the proper district upon the petition of the plaintiffs. Afterwards the landlords of the original defendant, who were of the same citizenship as the plaintiffs were let in as defendants: *Held*, that the cause was thereupon improperly remanded to the state court: *Phelps v. Oaks*, S. C. U. S. Oct. Term 1885.

STATUTE.

Repealing Clause in Unconstitutional Statute.—A repealing clause in an unconstitutional statute, declaring that "all laws and parts of laws in conflict with this act, be and the same are hereby repealed," does not affect the previous laws: *Wilhe v. Barnes*, 24 or 22 Fla.

WILL.

Latent Ambiguity—Parol Evidence.—Action in ejectment to recover lot of land in Washington, D. C. The plaintiff claimed title under Henry Walker, devisee of James Walker. The latter by his will made specific devises of real estate in the city of Washington, to four different persons, designating each property devised, by reference to squares and lots as numbered on a recorded plat or survey of the city. This was followed by a devise of the balance of his real estate "believed to be and to consist in" various other lots designated in like manner, but (lot No. three in square four hundred and six, hereinafter referred to, was not mentioned) one of the specific devises was "to my brother, Henry Walker, forever, lot numbered six, in square four hundred and three, together with the improvements thereon erected, and appurtenances thereto belonging." Parol evidence was offered on behalf of plaintiff to show that the testator did not own lot number six, in square four hundred and three, but did own lot number three in square number four hundred and six, that the former had no improvements on it at all, while on the latter there was a dwelling-house; this, for the purpose of explaining an alleged latent ambiguity in the devise to Henry Walker, so as to control the description of the lot therein contained, and make it apply to lot three in square number four hundred and six. The court below held the evidence insufficient: *held*, reversing the judgment of the court below, that the evidence taken in connection with the whole tenor of the will raises a latent ambiguity, and amounts to demonstration, as to which lot was in the testator's mind. Justices WOOD, MATTHEWS, GRAY and BLATCHFORD dissent: *Patch v. White*, S. C., U. S., Oct. Term, 1885.

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THE COMPETENCY, AS WITNESSES, OF HUSBAND
AND WIFE.

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- III. NOT COMPETENT AGAINST EACH OTHER.
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- XVII. CRIMINAL ACTIONS.
 - 1. *In general.*
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I. THE COMMON-LAW RULE EXCLUDING THEM.—The rule of the common law excluding parties from the witness-box also excluded the husband or wife of a party, as a witness for or against the party: Co. Litt. 6 b; Gilb. Ev. 119; Bull. N. P. 286. Where the husband was a party, the wife could not testify: *Weikel v. Probasco*, 7 Ind. 690; *Manchester v. Manchester*, 24 Vt. 649; *Kelley v. Proctor*, 41 N. H. 139; nor could she where the husband was disqualified by reason of interest in the event: *Pryor v. Ryburn*, 16 Ark. 671; *Smead v. Williamson*, 16 B. Mon. (Ky.) 492; *Griffin v. Brown*, 2 Pick. (Mass.) 304; *Larrabee v. Wood*, 54 Vt. 452; so, also, the wife being a party, the husband was incompetent: *Higdon v. Higdon*, 6 J. J. Marsh. (Ky.) 48; *Cull v. Herwig*, 18 La. Ann. 315; *Stewart v. Stewart*, 7 Johns. Ch. (N. Y.) 229; *Obstorn v. Black*, Spear's Ch. (S. C.) 431.

This rule was founded partly on their identity of interest, and partly on a principle of public policy lying at the basis of civil society, which was intended to guard the security and confidence of private life, and prevent discords in families, even at the risk of an occasional failure of justice: *O'Connor v. Majoribanks*, 4 M. & G. 443; *Stein v. Bowman*, 13 Pet. (U. S.) 223; *Davis v. Dinwoody*, 4 T. R. 678; *Bentley v. Cooke*, 3 Doug. 422. The rule was an inflexible one, and from it no evasion was permitted: *Kemp v. Downham*, 5 Harr. (Del.) 417; *Waddams v. Humphrey*, 22 Ill. 661; *Bradford v. Williams*, 2 Md. Ch. 1; *Kimbrough v. Mitchell*, 1 Head (Tenn.) 539. And see *Peaslee v. McLoon*, 16 Gray (Mass.) 488, where the English cases are reviewed. This common-law rule also prevailed in equity: *Vowles v. Young*, 13 Ves. 144, and even the death of one of the parties to the marriage (*infra*, XI., XII.), or its dissolution by divorce or judicial annulment did not operate to relax it: *infra*, XIII.

II. SCOPE AND EXTENT OF THE RULE.—The rule was applied to exclude the wife where, though not the nominal party, the husband was the beneficial plaintiff in the suit: *Pyle v. Maulding*, 7 J. J. Marsh. (Ky.) 202; *Farrell v. Ledwell*, 21 Wis. 182; *Joice v. Branson*, 73 Mo. 28. If his interests were directly involved so as to be concluded by any verdict or judgment in the case, she could not testify: *Young v. Gilman*, 46 N. H. 484; *Pringle v. Pringle*, 59 Penn. St. 281; *Larrabee v. Wood*, 54 Vt. 452; *Lewis v. McDougall*, 17 Wis. 517. Direct interest of either spouse, in the result of the litigation, totally disqualified the other as a witness:

Wheeler v. Wheeler, 47 Vt. 637; *Bierly's Estate*, 81* Penn. St. 419. So, though the husband was not a party, the wife could not testify to any matter for which he might be indicted: *Den v. Johnson*, 3 Harr. (N. J.) 87; and the wife of one of two or more co-defendants was an incompetent witness, either for or against the other defendants who joined with her husband in the defence: 1 Hale P. C. 301; *Rex v. Hood*, 1 Moo. C. C. 281; *Tomlinson v. Lynch*, 32 Mo. 160; *Craig v. Kittredge*, 20 N. H. 169; even after her husband had suffered a default to be taken against him: *Sparhawk v. Buell*, 9 Vt. 41.

In applying these principles, it has been held that a witness whose wife had funds invested in the business of the plaintiff copartnership was incompetent as a witness: *Jackson v. Miller*, 1 Dutch. (N. J.) 90; as was a witness whose wife was a stockholder in the bank which brought the suit: *Routh v. Agricultural Bank*, 12 Sm. & M. (Miss.) 161; and another, the trustee of his wife's property being a party, was not permitted to testify for the trustee, although he had no interest in the subject-matter of the trust: *Burrell v. Bull*, 3 Sandf. Ch. (N. Y.) 15; *Hasbrouck v. Vandervoort*, 9 N. Y. 153. So, the husband was not permitted to testify in support of a nuncupative will claimed to have been made in favor of his wife: *Jones v. Norton*, 10 Tex. 120; or to prove a marriage contract in her favor: *McDuffie v. Greenway*, 24 Tex. 625.

The wife of a special bail was incompetent for the principal defendant: *Leggett v. Boyd*, 3 Wend. (N. Y.) 376. She could not prove the fact of her husband's bankruptcy: *Ex parte James*, 1 P. Wms. 610, 611. And neither could testify, in a proceeding to which they were parties, to enforce a mechanic's lien against their property: *Briggs v. Titus*, 7 R. I. 441.

But this common-law rule has been greatly relaxed in many jurisdictions, and almost totally abrogated in others. The various statutory provisions effect quite different results in the several states, some of them placing the admissibility of the testimony of husband and wife upon the same plane as that of persons in no way related one to another (except as to confidential communications between them), and others only partially, and with more hesitancy obliterating the safeguards built up around the marriage relation by the common law. In one respect, however, there seems to be considerable unanimity among the decisions interpreting the so-called "enabling acts," that is, it is pretty well settled by the weight of

authority, that the removal, by these statutes, of the disqualification of interest in the event, as a party or otherwise, does not remove the common-law inhibition as to the testimony of husband or wife for or against the other, the common-law rule not being founded upon the interest of the witness, but upon grounds of public policy: *Lucas v. Prooks*, 18 Wall. (U. S.) 436; *Dawley v. Ayers*, 23 Cal. 108; *Stanley v. Stanton*, 36 Ind. 445; *McKeen v. Frost*, 46 Me. 239; *Kelley v. Drew*, 12 Allen (Mass.) 107; *Gee v. Scott*, 48 Tex. 510; *Cram v. Cram*, 33 Vt. 15; *Re Jones*, 6 Biss. (U. S.) 68 (Wisconsin). To the contrary see *Lockhart v. Luker*, 36 Miss. 68; but compare *Dunlap v. Hearn*, 37 Id. 471.

Another rule of construction of these statutes is, that the witness is not rendered competent, merely because the husband or wife of the witness is a party, and the statutes render parties competent, but that the witness himself, or herself, as the case may be, must be a party in order to get the benefit of the statute: *Barber v. Goddard*, 9 Gray (Mass.) 71; *Ray v. Smith*, Id. 141; *Blake v. Lord*, 16 Id. 387; *White v. Stafford*, 38 Barb. (N. Y.) 419; *Carpenter v. Moore*, 43 Vt. 392.

III. NOT COMPETENT AGAINST EACH OTHER.—It was well settled at common law that neither party to the marriage could testify against the other in any action, civil or criminal: *Kyle v. Frost*, 29 Ind. 382; *Carter v. Taylor*, 20 La. Ann. 421; *Blain v. Patterson*, 47 N. H. 523; *Copous v. Kauffman*, 8 Paige (N. Y.) 583; *Erwin v. Smaller*, 2 Sandf. (N. Y.) 340; *Edwards v. Pitts*, 3 Strobb. (S. C.) 140; even though her husband was unnecessarily made a co-defendant in equity, the wife was not competent for the plaintiff: *Leach v. Shelby*, 58 Miss. 681. She could not discredit a joint title in herself and her husband coming to them through her own heirship: *Moody v. Fulmer*, 3 Grant Cas. (Pa.) 17; nor could she give testimony the tendency of which was to discredit her husband: *Keaton v. McGwier*, 24 Ga. 217; contra, *Ware v. State*, 6 Vr. (N. J.) 553. She could not support an action against her husband for the price of her own board: *Burlew v. Shannon*, 14 Gray (Mass.) 433; or testify against him in an action against both for the value of labor and materials furnished to herself: *Main v. Stephens*, 4 E. D. Sm. (N. Y.) 86; s. p. *Bast v. Anspach*, 1 Leg. Gaz. Rep. (Pa.) 25.

On the other hand, the husband was also forbidden to testify

against his wife, even to prove his marriage to her where she sued as a *feme sole*: *Bently v. Cook*, 3 Doug. 442; or to prove that property sought to be replevied from the wife was purchased by him and sold to the plaintiff, in rebuttal of testimony tending to show a gift of the property to the wife: *Stanley v. Schultz*, 47 Ind. 217; compare *Davis v. Dunwoody*, 4 T. R. 678.

IV. OR FOR EACH OTHER.—Neither was the husband allowed to testify in favor of the wife, or the wife in favor of the husband, in civil or criminal proceedings. If a female defendant pleaded coverture, the alleged husband could not prove his marriage with her: *Woodgate v. Potts*, 2 Car. & K. 457. (This was held otherwise in some criminal cases. See *infra*, XVII.) The husband could not testify in behalf of the interest of the wife in her separate estate: *Miller v. Williamson*, 5 Md. 219; *Wilson v. Sheppard*, 28 Ala. 623; *Dwelly v. Dwelly*, 46 Me. 377; *Williamson v. Morton*, 2 Md. Ch. 94; *Marsman v. Conklin*, 2 C. E. Green (N. J.) 282; *Cramer v. Reford*, Id. 367; *Galway v. Fullerton*, Id. 389; *Warner v. Dyett*, 2 Edw. (N. Y.) 497; and this, even though she was not a party to the record: *Cobb v. Edmondson*, 30 Ga. 30; *Harrell v. Hammond*, 25 Ind. 104. So, on the trial of a right of property, where the claimant was a *feme covert*, her husband was incompetent in her behalf: *Moore v. McKie*, 5 Sm. & M. (Miss.) 238; s. p. *Wall v. Nelson*, 3 Litt. (Ky.) 395; *Caperton v. Callison*, 1 J. J. Marsh. (Ky.) 397; *Hopkins v. Smith*, 7 Id. 263; *Hodges v. Branch Bank*, 13 Ala. 455; and so was he where the claimant was a trustee for the wife: *Hall v. Dargan*, 4 Ala. 696; s. p. *Wier v. Buford*, 8 Ala. 134; and the wife was likewise incompetent to testify in the husband's favor under like circumstances: *Dexter v. Parkins*, 22 Ill. 143.

Again, a husband was not a competent witness to a deed conveying land to the wife, and executed during marriage: *Johnston v. Slater*, 11 Gratt. (Va.) 321. He could not testify for her even though he had no personal interest whatever in the result of the suit: *Hosack v. Rogers*, 8 Paige (N. Y.) 229. Where the wife was a distributee and would gain by setting aside the will, the husband could not testify for the contestant: *Walker v. Walker*, 34 Ala. 469; nor could he in such a case, there being no will, testify for the administrator in an action against him: *Gilkey v. Peeler*, 22 Tex. 663; or in an action brought by the administrator to

increase the assets of the estate: *Lisman v. Early*, 12 Cal. 282. Even where the wife sued to recover damages sustained by her from the intoxication of her husband, caused by the use of liquor sold to him by the defendant, he could not testify in her behalf: *Jackson v. Reeves*, 53 Ind. 231; contra, in Illinois: *Noy v. Creed*, 1 Ill. App. 557.

The wife was equally debarred from aiding her husband's cause. Both her testimony and her declarations were inadmissible in his behalf: *Karney v. Paisley*, 13 Iowa 89. She could not sustain a title granted by her husband by deed of general warranty: *Leach v. Fowler*, 22 Ark. 143; or aid him in resisting an attachment suit: *McCollem v. White*, 23 Ind. 43; *Boyle v. Haughey*, 10 Phila. (Pa.) 98; or in maintaining trespass *de bonis asportatis*: *Hayes v. Parmalee*, 79 Ill. 563. She could not, by her declarations made soon after the birth of her child, that it was born alive, support her husband's claim to an estate by the curtesy: *Gardner v. Klutts*, 8 Jones L. (N. C.) 375. Her testimony was inadmissible even where he had only a contingent interest in the result of the suit favorable to the party for whom her testimony was offered; e. g., when the husband's fees as attorney depended upon it: *Whitehead v. Foley*, 28 Tex. 268. The only case in which she could testify in favor of her husband was where she had acted as his agent, and within the scope of her authority as such agent: *Hardy v. Mathews*, 42 Mo. 406; *Mountain v. Fisher*, 22 Wis. 93. See *infra*, IX.

The statutory departures from these principles are numerous. Thus, it is now held in some jurisdictions that the husband or wife may testify in favor of the other when the latter is unnecessarily made a party: *Green v. Taylor*, 3 Hughes (U. S.) 400; or where both are co-plaintiffs or co-defendants: *Marsh v. Potter*, 30 Barb. (N. Y.) 506. Another rule is, to admit either to testify in his or her own behalf only: *Rogers v. Rogers*, 46 Ind. 1; or in behalf of the other who is interested but not a party to the record: *Peaslee v. McLoon*, 16 Gray (Mass.) 488; *Hastings v. McKinley*, 1 E. D. Smith (N. Y.) 273.

The husband is held competent to testify in support of his wife's claim to property: *Porter v. Allen*, 54 Ga. 623; *Wing v. Goodman*, 75 Ill. 159; *Allen v. Russell*, 78 Ky. 105; or where the action affects her separate property only: *Snell v. Bray*, 56 Wis.

156; or is brought to recover for services rendered by her: *Fowle v. Tidd*, 15 Gray (Mass.) 94.

The wife is competent for her husband (defendant in execution) on a trial of the right of property: *Hemphill v. Townsend*, 7 Ala. 853; or, generally, under the Connecticut statute: *Merriam v. Hartford, &c., Rd.*, 20 Conn. 354; (contra, in North Carolina: *Rice v. Keith*, 63 N. C. 319); *e. g.*, to corroborate her husband: *Lincoln Avenue, &c., Road Co. v. Madans*, 102 Ill. 417; the jury to give her testimony "such credit as under the circumstances they think it entitled to:" *State v. Nash*, 10 Iowa 81. She may testify for him when sued by an administrator, she not being a party to the record: *Thompson v. Wadleigh*, 48 Me. 66; or when sued in trespass, for breaking and entering and setting fire to plaintiff's barn: *Bucknam v. Perkins*, 55 Me. 490. She may aid him in establishing a claim against the estate of a deceased person: *Barry v. Sturdivant*, 53 Miss. 490; or testify in favor of his assignee: *Prince v. Down*, 2 E. D. Smith (N. Y.) 525; *Farley v. Flanagan*, 1 Id. 313. In Pennsylvania, she may testify for, but not against him: *Yeager v. Weaver*, 64 Penn. St. 425. Compare *Dellinger's Appeal*, 71 Id. 425. In Wisconsin the rule is that where two or more defendants must rely upon the same defence, so that proof of a good defence as to one establishes a defence as to the other, the wife of one cannot be a witness in behalf of the other, unless the circumstances are such as will permit her to testify directly for her husband. Accordingly, where the issue was whether a conveyance, under which both defendants claimed as grantees, was ever delivered to them by the grantor, it was held that the wife of one defendant (not being herself a party) could not testify for the other: *Stewart v. Stewart*, 41 Wis. 624. In an early Massachusetts case, on a note given to the wife before marriage, and endorsed subsequently by her husband, the wife was permitted to testify that the note was paid before the endorsement: *Fitch v. Hill*, 11 Mass. 286.

V. OR TO PROVE NON-ACCESS.—The common-law rule, founded on decency, morality and public policy, provides that neither the husband nor the wife, at any time during the continuance of the marriage, or after its determination by death or divorce, shall be allowed to prove non-access during wedlock, *i. e.*, the absence of the fact of sexual intercourse, or of the opportunity of sexual intercourse, whatever may be the form of the legal proceeding in which

such testimony is offered, or whoever may be the parties to it: *R. v. Rook*, 1 Wils. 340; *R. v. Luffe*, 8 East 193, 203; *R. v. Kea*, 11 Id. 132; *Goodright v. Moss*, Cowp. 494; *Cope v. Cope*, 1 M. & Rob. 269, 274. And the "enabling acts" do not seem to have changed the rule: *Chamberlain v. People*, 23 N. Y. 85; *Boykin v. Boykin*, 70 N. C. 262. Under it collateral facts could not be shown for the purpose of proving non-access: thus, the husband could not be asked whether, at a particular time, he did not live at a distance from his wife and cohabit with another woman: *R. v. Stourton*, 5 Ad. & E. 170. Neither party to the marriage could prove, directly, the illegitimacy of a child born during wedlock: *R. v. Mansfield*, 1 Q. B. 444. But in *R. v. Stourton*, *supra*, PATTERSON, J., said that the parents could bastardize their issue by any evidence except that of non-access. So, also, it is held that the wife may testify to her own adultery, and name her paramour. While she is not permitted to bastardize her own offspring, still the child's illegitimacy having been shown by proper evidence, she is sometimes, from necessity, permitted to testify as to who is the father of the child: *Ratcliffe v. Wales*, 1 Hill (N. Y.) 63, 65; *People v. Overseers of Ontario*, 15 Barb. (N. Y.) 286; *Parker v. Way*, 15 N. H. 45; *Commonwealth v. Shepherd*, 6 Binn. (Pa.) 283; *State v. Pettaway*, 3 Hawks (N. C.) 623; *R. v. Reading*, Cas. t. Hardw. 79, 82; *R. v. Luffe*, 8 East 193. But the mother of a child begotten before, but born after marriage, could not testify that her husband was not its father: *Dennison v. Page*, 29 Penn. St. 420; *R. v. Mansfield*, 1 Q. B. 444. That she can testify in favor of legitimacy, see *Mosely v. Eakin*, 15 Rich. (S. C.) 324. See, also, *Cooke v. Lloyd*, Peake Ev. App. xxviii.

When the controversy is between third persons, there are cases which hold the husband and wife competent to testify as to the time of their marriage, the fact of access, the date of the birth of a child, and any other independent facts affecting the question of legitimacy: *Standen v. Standen*, Peake's Cas. 32; *R. v. Bramley*, 6 T. R. 330; *Parker v. Way*, 15 N. H. 45; *Corson v. Corson*, 44 Id. 587; *Page v. Dennison*, 1 Grant Cas. (Pa.) 377; *Leaphart v. Leaphart*, 1 S. C. 199; but in these cases, for the most part, the evidence was admitted *ex necessitate*. See, also, *Raynham v. Canton*, 3 Pick. (Mass.) 293; *Shaak's Estate*, 4 Brewst. (Pa.) 305.

VI. PROVING THE MARRIAGE—ITS DURATION IMMATERIAL.

(1.) *Proving the marriage*.—Sometimes, where the competency

of a witness is questioned on the ground of marriage to a party or person interested, the *factum* of the marriage is disputed, and such marriage must be proved, to exclude the witness, or disproved, to admit him. The presumption arising from cohabitation is not enough to exclude the witness: *Hill v. State*, 41 Ga. 484; although presumptive proof of the marriage has been considered sufficient to render the wife an incompetent witness against the husband to disprove the marriage: *Scherpf v. Szadeczky*, 4 E. D. Smith (N. Y.) 110; *Rose v. Niles*, 1 Abb. Adm. 411.

Generally, the husband or wife is competent to prove the marriage, so as to render the other an incompetent witness: *Dixon v. People*, 18 Mich. 84; or to sustain the objection that the plaintiff was a married woman suing without her husband or any next friend: *Willis v. Underhill*, 6 How. Pr. (N. Y.) 396; contra, *Bentley v. Cook*, 3 Doug. 442. So, also, the wife is a competent witness, in behalf of her children, to prove the marriage between herself and her husband: *Christy v. Clarke*, 45 Barb. (N. Y.) 529. But a woman who claimed to be the widow of an intestate, and as such entitled to letters on his estate, was held incompetent to establish the *factum* of her marriage with the deceased: *Redgrave v. Redgrave*, 38 Md. 93; compare *Fitzsimmons v. Southwick*, 38 Vt. 509. Otherwise held, where the *legality* of her marriage with the deceased was the only question in issue: *Greenawalt v. McEnelley*, 85 Penn. St. 352.

The marriage must be a lawful one to exclude the parties to it. Lover and mistress are not incompetent witnesses by reason of the fact of their immoral cohabitation: *Bathews v. Galindo*, 4 Bing. 610; *Flanagin v. State*, 25 Ark. 92; *Dennis v. Crittenden*, 42 N. Y. 542. Where the validity of the marriage is in doubt the witness is generally rejected: *Peats's Case*, 2 Lew. C. C. 288; *Wakefield's Case*, Id. 279; *Campbell v. Tremlow*, 1 Price 81, 88, 90, 91. See, also, *Divoll v. Leadbetter*, 4 Pick. (Mass.) 220. The fact that the parties, in good faith, believe their marriage to be valid, does not make it so; and, its invalidity being shown, each becomes a competent witness for all purposes, even the disclosure of facts communicated by one to the other during the period they lived together, honestly supposing their relation to be that of husband and wife: *Wells v. Fletcher*, 2 Car. & P. 12; *Wells v. Fisher*, 1 M. & Rob. 99, and note. In Utah the statute excludes the wife, except where the action is between herself and her husband. A

witness was offered by a party to the suit on trial, with the statement that "she is his plural or second wife." It was held that such witness should be excluded, and the court would not try the question of the validity of the marriage, or the relations of the parties: *Friel v. Wood*, 1 Utah T. 160; but compare *Miles v. United States*, 103 U. S. 304; s. c. 2 Crim. L. Mag. 489, reversing 2 Utah T. 19.

(2.) *Its duration immaterial*.—At what period the marital relation had its inception is of no importance on the question of the competency of either party to that relation as a witness for or against the other. Where one party married a witness already subpoenaed by his opponent to testify on the approaching trial, she was excluded: *Pedley v. Wellesley*, 3 Car. & P. 558. Nor does it matter that the relation has been ended by death or judicial decree. See *infra*, XI., XII., XIII. In such an event, the Supreme Court of the United States has said: "It is true the husband was dead, but this does not weaken the principle. Indeed, it would seem rather to increase than lessen the force of the rule:" *McLEAN, J.*, in *Stein v. Bowman*, 13 Pet. (U. S.) 209. See, also, *Patton v. Wilson*, 2 Lea (Tenn.) 101. Even where the cause of action accrued to the wife before marriage, the husband was rejected as a witness: *Collins v. Mack*, 31 Ark. 684; contra, *Perry v. Whitney*, 30 Vt. 390. Nor could the wife testify in such cases, the husband being a party: *Smith v. Boston, &c., Rd.*, 44 N. H. 334; *Donnelly v. Smith*, 7 R. I. 12.

VII. LIMITS AND EXCEPTIONS TO THE RULE.—The rule we are examining, like all other general regulations of the common law, is subject to numerous exceptions, so called, most of them, however, being more seeming than real. Bearing in mind the object of the rule—to secure the confidence of private life and prevent discord in families—and that it only forbade the parties to the marriage to enter the witness-box for the purpose of testifying for or against one another, we readily see that in cases where one of the parties to the marriage was a competent witness at common law, the other was also competent; and so it was held: *Wilson v. People*, 5 Park. (N. Y.) 119; *Seigling v. Main*, 1 McMull. (S. C.) 252; *Abbott v. Clark*, 19 Vt. 444. But the wife may be competent where the husband is not, *e. g.*, where he has been convicted of felony or perjury: *State v. Anthony*, 1 McCord (S. C.) 285.

Again, where the wife had no interest in the suit, the husband was admitted as a witness, and *vice versa*: *Meni v. Rathbone*, 21 Ind. 454; *Howell v. Zerbee*, 26 Id. 214; *Mitchell v. Clagett*, 9 Md. 42; *Hall v. Murphy*, 14 Tex. 637; *Robinson v. Hutchinson*, 31 Vt. 443. Thus, where a complaint shows the cause of action to be wholly in the husband, he is a competent witness in his own behalf, although the wife may be joined as a plaintiff: *Lockwood v. Joab*, 27 Ind. 423. And in some cases one spouse was deemed competent where the other was not made a party, and for that reason: *Deck v. Johnson*, 30 Barb. (N. Y.) 283; *Leavitt v. Bangor*, 41 Me. 458; *Bonett v. Stowell*, 37 Vt. 258. In one case found, the admission of the husband's testimony, against the objection of the wife, was held not to be error, because "he testified to nothing untrue or prejudicial to her interest:" *Wade v. Powell*, 31 Ga. 1; see, also, *R. & B. Rd. Co. v. Lincoln*, 29 Vt. 206. The fact that his testimony tends to increase a fund held in trust for his wife, will not exclude him, his interest being contingent: *Dyer v. Homer*, 22 Pick. (Mass.) 253; see, also, *Sneckner v. Taylor*, 1 Redf. (N. Y.) 427; *Peiffer v. Lytle*, 58 Penn. St. 386; *Rose v. Blair*, 1 Meigs (Tenn.) 525.

Again, the wife can be a witness to testify as to the contents of a lost trunk, the property of her husband: *Illinois, &c., Rd. Co. v. Taylor*, 24 Ill. 323; *Same v. Copeland*, Id. 332; *Sassen v. Clark*, 37 Ga. 242; *McGill v. Rowand*, 3 Penn. St. 451. And so may she in a joint suit to recover her separate property: *Gee v. Lewis*, 20 Ind. 149. Some cases admit the witness, because it appears that he or she, as the case may be, has no interest in the event, thus putting as the ground of incompetency *interest only*: *Jackson v. Baird*, 4 Johns. (N. Y.) 230; *Town v. Needham*, 3 Paige (N. Y.) 546. Where the testimony related solely to a defence peculiar to the witness, it was admitted, and the witness allowed to testify in his or her own behalf only, and not in behalf of the other spouse: *Klenk v. Knoble*, 37 Ark. 298; *Call v. Byram*, 37 Ind. 499.

VIII. COLLATERAL PROCEEDINGS.—While it was an inflexible rule that neither husband nor wife should be permitted to testify against the other, where either was directly and immediately interested in the event of the action or proceeding, whether civil or criminal, yet, in collateral proceedings not immediately affecting their mutual interest, their testimony was receivable, even though

the testimony of one tended to contradict that of the other, or might subject the other to a legal demand, or even to a criminal prosecution: *Commonwealth v. Reid*, 8 Phila. (Pa.) 385; s. c., 1 Pa. Leg. Gaz. Rep. 182, where the cases are fully discussed. But it is the privilege of the witness to decline to testify to such matters as will criminate the other party to the marriage.

In a comparatively early English case the rule was laid down that a husband or wife ought not to be permitted to give any evidence that may even tend to criminate the other: *King v. Inhab. of Cliviger*, 2 T. R. 263. This rule was much discussed in two subsequent cases in the Court of King's Bench (*King v. Inhab. of All Saints*, 6 Mau. & Sel. 194, and *King v. Inhab. of Bathwick*, 2 Barn. & Ad. 639, 647), the court, after much argument, deciding that the rule must be restricted. Lord ELLENBOROUGH remarked that the rule was laid down "somewhat too largely." In *King v. Bathwick*, where, the question being a female pauper's settlement, a man had been called to prove his marriage to her, another woman was held a competent witness to prove her own previous marriage with the same man; for although, if the testimony of both witnesses were true, the husband had been guilty of bigamy, yet neither the testimony given, nor any decision of the trial court founded on that testimony, could thereafter be received in evidence to support an indictment against him for that crime; it being altogether *res inter alios acta*, and neither the husband nor the wife having any interest in the decision of the question. In the opinion, the court said that the rule laid down in *King v. Cliviger* "is undoubtedly true in the case of a direct charge and proceeding against him for any offence," but denied its correctness when applied to collateral matters. See, also, *Fitch v. Hill*, 11 Mass. 287; *Baring v. Reeder*, 1 Hen. & M. (Va.) 154, which decisions are commented on by Chief Justice PARKER, of Massachusetts, as follows: "They establish this principle, that the wife may be a witness to excuse a party sued for a supposed liability, although the effect of her testimony is to charge her husband upon the same debt, in an action afterwards to be brought against him. And the reason is, that the verdict in the action in which she testifies, cannot be used in the action against her husband; so that, although her testimony goes to show that he is chargeable, yet he cannot be prejudiced by it. And it may be observed, that, in these very cases, the husband himself would be a competent witness, if he

were willing to testify, for his evidence would be a confession against himself:" *Griffin v. Brown*, 2 Pick. (Mass.) 308. See, also, *Vowles v. Young*, 13 Ves. 144; *Williams v. Johnson*, 1 Str. 504, and *Henman v. Dickinson*, 5 Bing. 183, where, the suit being by indorsee against acceptor, and the defence fraudulent alteration by drawer after acceptance, the wife of the drawer was allowed to prove such alteration.

STEWART REPALJE.

(To be continued.)

THE EFFECT OF A RECENT DECISION ON THE LAW OF MARINE INSURANCE.¹

IN *The Phoenix Insurance Co. v. The Erie and Western Transportation Co.*, 117 U. S. 213, it was held (BRADLEY, J., dissenting,) that (1) a carrier can lawfully contract with the shipper by his bill of lading "in case of liability to have the full benefit of any insurance that may have been effected upon or on account of said goods." (2) The insurer paying the loss is deprived of the right to sue the carrier by whose negligence the cargo was lost.

The result in this case of the decision by a court of such importance as the Supreme Court of the United States on the right of a shipper to agree with his carrier to give the latter the benefit of the separate contract of the former with a third party (the insurer) would excite surprise if it was not also the conclusion of other respectable courts on the same subject.

It points out very clearly that a different train of thought is excited in the minds of underwriters and their adjusters from that of the judiciary by the presentation of the same facts; which is right and which is wrong is immaterial, for the law is on the side of the courts, even if the weight of reason is the other way. The minds of lawyers are submissive to authority and not critical. It will not, however, be thought captious to point out what other conclusions must follow from this ruling.

¹ This article was received too late to append it as a note to the case to which it relates, which is reported in the May number (*ante*, p. 330), and which will also appear in 117 U. S. Reports 213. The article contains the dissenting opinion of Mr. Justice BRADLEY, hitherto unpublished.

While underwriters believed that they only agreed to indemnify those they agreed to insure and who paid the price for the risk assumed, the law is otherwise, in spite of the strong dissent of Mr. Justice BRADLEY, hereafter reported, and the insurers of shippers under these bills of lading, not only agree to indemnify their assured from loss, but also any carrier with whom the insured had no transactions, from the liability he may incur by negligently destroying the property intrusted to his care; so that a carrier who, in the course of his employment, destroys the cargo he became possessed of for the lawful purpose of carrying, becomes *ipso facto* by the terms of the modern bill of lading indemnified *ab initio* for his future wrong, in the same manner; as the six carpenters who entered lawfully on the premises of another on a breach of duty or behavior, became trespassers *ab initio*.

Nor does the opinion of the dissenting judge stand alone. The claim of the carriers to be indemnified by insurers of the shippers from their relation to the cargo, has been presented before and has been denied by Chief Justice TINDAL, in *Yates v. Whyte*, 4 Bing. N. C. 272, who said it would be to hold that the wrongdoer should be permitted to take all the benefit of the policy without having paid the premium, and by Mr. Justice GRIER, in *The Monticello*, 17 How. 153, who pointed out with some warmth, when this proposition came before him, that the insurer was not a joint trespasser with the carrier, so that payment by one is a release of the other: (at p. 155.)¹

This view of the relation of the insurer to his insured has been obliterated by the decisions which culminated in the above decision at Washington.

¹ It was probably in consequence of these and other decisions that the clause in question was inserted in the bill of lading of the large carrying companies, which have increased in length until they have become treatises on the law of carriage with many, if not most, of the decisions of the courts reversed by agreement of the parties. This remark will especially apply to through bills of lading, which, under their many exceptions of liability agreed upon, or rather insisted upon by the carrier, are substantially agreements to deliver the goods at destination, if it should happen that they arrive there in safety. The carriers of a more humble class still confine their exceptions of liability to that of fire, which is now excepted by law as to ship-owners, and the old-fashioned limitations of the act of God and public enemies. The clause now sustained will probably be universally adopted, and be met by an agreement of insurers to increase the premiums where the carrier's liability is limited, and to avoid the policy if the shipper destroys his insurer's right of reclamation against the carrier.

A short sketch of these decisions may not be uninteresting, and will be of value to such lawyers as are interested in the very important and by no means artificial subject of the law of insurance.

In 1859 the Court of Appeals of New York, in *Mercantile Ins. Co. v. Caleb*, 20 N. Y. R. 173, suggested, although it did not so decide, that a carrier could obtain by agreement the benefit of his shipper's insurance without the consent of the insurer, although the courts of the same state had in effect decided the very reverse when they held that if the shipper surrendered to the carrier any right of reclamation, which his insurer paying the loss would become entitled to by subrogation, he *pro tanto* discharged the insurer whose rights were involved: *Atlantic Ins. Co. v. Storrow*, 5 Paige 285. Chief Justice GIBSON decided similarly as to insurances by mortgagees, in *Smith v. Columbia Ins. Co.*, 17 Penn. St. 253.

The same must be said of the English decision (*Tate v. Hyslop*, L. R., 15 Q. B. Div. 375,) in which BRETT, the Master of the Rolls, is in the Supreme Court decision correctly stated as saying in effect "the omission of the assured to disclose their agreement with the lighterman could only have affected the amount of salvage, which the underwriters might have had, and would have been immaterial to the risk, and consequently to the insurance;" but as he, as well as all the other judges who united in the opinion decided the reverse, viz., that where the insured failed to notify his insurer that he had relieved his carriers by contract, from full liability at law, he thereby failed to communicate a fact material to the risk, and the insurer was discharged. The two rates of premium adopted by the insurer showed that it was material to the risk.

This case, although cited as an authority in the decision of the Supreme Court, cannot be so considered; the sentence quoted is: the decision is otherwise.

The other decisions may be briefly summarized as follows:

In the case now under discussion, which was heard on appeal from the Circuit Court of Wisconsin (reported in *Lawson on Carriers* 382; also 10 Bissell 18-38), the carrier had inserted in his bill of lading the clause whose validity is now finally sustained. "The carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods;" it was held by the District Court of Wisconsin and by the Cir-

cuit Court on appeal, that as the carrier could insure his liability arising from the negligence of the servants, he could stipulate that his shipper should give him the benefit of his insurances, and thus destroy the right of the insurance company to sue for the loss sustained by the default of the carrier on payment to their insured.

The Circuit Court for the Southern District of New York, in *Riotoul v. Railroad*, 17 Fed. Rep. 903 (also 21 Blatch. 430, and 23 Am. Law Reg. (N. S.) 294), followed, for the same reasons.

This is certainly, however, not a self-evident proposition. Neither court adverted to the enormous difference which exists between the rights of a shipper who paid the premium and the carrier who did not. Nor did either court advert to the fact that it was a bargain in which the insurer, who is a surety only, had a right to be consulted. But they at once judicially transformed the right of subrogation by this one-sided contract, converting the subrogation of a surety for the injury done to his principal, into that of a trespasser against the surety of the party whom he had wronged by his neglect.

A strong sense of humor might have prevented these conclusions, which seem a paradox on the beneficent law of subrogation.

Judge WALLACE, in *The Hadji*, 22 Blatch. 235, decided that a stipulation "that no damage that can be insured will be paid for," was invalid, "because it would compel the owners of the goods to insure against the negligence of the carrier." Although this ruling is distinguished from the case of a claim to have the benefit of any insurances effected upon the goods, it is safe to say that in the case of ocean transportation, where all cargoes are insured, the two stipulations mean, and are in effect the same thing, as with the limited liability of owners and the excepted risks of the perils of the seas—prudence requires all cargoes to be insured. The amount of marine risks taken proves this. If marine insurance was an exceptional incident of ocean transportation, the distinction might be a substantial one, as it is only verbal. This is what the late Mr. Justice GRIER termed law for professors as distinguished from the law for business.

Next came *Carstairs v. Insurance Co.*, 13 Fed. Rep. 823, followed in 18 Id. 473, in which the Circuit Court of Maryland, not feeling itself bound to disagree with the conclusions of the other Circuit Courts that a public carrier could exact such a stipulation from his employer, followed these decisions to the necessary conclusion, that the shipper by destroying his insurer's right of reclama-

tion against those who injured the insured goods necessarily avoided the policy. Of the correctness of this conclusion there can be no fair doubt; it is self-evident as soon as it is admitted, as was decided in *Hall v. Railroad Co.*, 13 Wall. 367, that the contract of insurance was one of indemnity only.

This last case in the U. S. Circuit Court for Maryland attracted much attention; it was thought by some that this decision had put an end to the distressing questions which sprang up in the settlement of carriers' losses. Large fires at railroad terminal shipping points, had given rise to lawsuits to adjust the losses between the two sets of insurers of the shipper and the railroad; for it might well be asked, how can the courts by any process of reasoning give the carriers the benefit of the insurances, which by the terms of their own bills of lading, they had made void and of no effect.

But the Supreme Court of Massachusetts relieved the courts of this difficulty, in *Jackson v. Boylston Insurance Co.*, 139 Mass. 508, by deciding that the rule in *Carstairs v. Insurance Company*, only applied where the insured agreed by the policy to give the insurer subrogation to his claim against the carrier, not adverting to the fact that the right was given by law the moment the insurance was made, and without such agreement being entered. (See all the cases from *Mason v. Sainsbury*, 3 Dougl. 61, decided in 1782, to *Mobile v. Jurey*, in 111 U. S. 584, decided in 1884.) It can hardly be that such an agreement could have any greater effect than a notice to the assured of the rights of the insurer.

It is proper, however, to advert to one reason given by the Supreme Court of Massachusetts, which is more specious than real; that is, that the acceptance of a bill of lading with the usual exception of liability for loss by fire, would, if the rule in *Carstairs v. Ins. Co.* was insisted on, also vitiate the policy. This, however, is subject to the consideration, that the fire exception is universal in all bills of lading, is so well known, and for so long a time, that every insurer who takes a risk on goods in carriage, knows that the shipper has agreed to that exception in his contract of carriage; and therefore knows that he insures goods with this limitation of the carrier's liability. The insurers accept such risks with notice derived from the universal custom, and this is consistent with the view of the King's Bench Division in the case cited in the Supreme Court.

There are other decisions somewhat similar, but they need not be

adverted to, one of which, in the Circuit Court of South Carolina (not reported), held that the shipper could not recover from a carrier unless he surrendered his policy, is notable.

All the courts seem to agree, that it was just and proper, that the carrier, the moment he became in default, and only then, should be indemnified by the insurer of the shipper, who had hitherto looked for reclamation, in the nature of salvage, from the party who injured the subject insured, and who by this bill of lading became insured, as respects the insurer.

The Supreme Court of Texas, in *Insurance Co. v. Railroad*, 63 Texas Rep. 471, carried the conclusion to its full and necessary result, if the premises are granted, by holding that a carrier may bring a suit against the insurers of any of their shippers, and recover the loss which the carrier had paid the shipper. As these views are sustained, and fully, by the Supreme Court of the United States, it is well to call attention to the vigorous dissent of Mr. Justice BRADLEY, orally delivered, as follows :

“ The law gives to the insurance company paying the insurance a right to be subrogated to the claim which the owner has against those who caused the injury which the insurer is called upon to repair. The thing insured, in this case, was cargo, for which the owner received a bill of lading : this bill contained an agreement between the owner of the cargo and the carrier, that the latter should have the benefit of any insurance effected on the cargo, by paying loss if liable. Now I say :

“ 1. This agreement in the bill of lading was *res inter alios acta*, as to the insurer, and he was not bound or affected by it. He had no notice of it. It was a fraud as against him. The owner of the cargo did not give up his right to sue the carrier and make him pay the loss. Had he done that, the subrogation of the insurer in the owner's place might be unavailing. The owner did not give up his own right to sue the carrier : he simply agreed with the latter, that the insurer should not have his legal right of subrogation, but should be answerable over to the carrier, if the latter paid the loss. This conspiracy against the insured behind his back, should be frowned upon by the law.

“ 2. The owner of the goods played a double part—he agreed with the insurer (*i. e.* the law implied an agreement), that the insurer, if he paid the loss, should be subrogated against the carrier, and he agreed with the carrier (privately), that if he paid the loss, he should be subrogated against the insurer.

"Now by this double dealing of the owner, the two parties, insurer and carrier, were placed in this relation to each other, namely: one of them must lose something—who ought it to be? The innocent insurer, whose *legal* rights were well known to the carrier; or the carrier by whose *fault* the loss occurred, and whose claim as against the insurer arose by a secret stipulation with the owner of the goods not communicated to the insurer? Surely the latter should bear the loss."

It is proper, therefore, to consider what will be the effects on adjustments of marine losses, by this bill of lading, which is now very generally adopted, and we may fairly believe will become universal. The case as presented, sustains the decree of the court below in favor of the insurers for a sum adjusted in general average. The adjustment is not set out, nor what was included in it. It is not adverted to in the decision, because, as the carrier did not appeal from the decree against him, it could not be reversed: (*The Dove*, 91 U. S. 381; *The Stephen Morgan*, 94 Id. 549); and the opinion of the Supreme Court does not touch the question. If the insurers were liable for a partial loss, they were equally liable for a total loss, and there is no reason why they should recover for a partial loss occasioned by the fault of the carrier, if they were not entitled to recover for a total loss. The clause in bills of lading, which is a contract between the shipper and carrier, and to which the former's insurer is not a party, gives indemnity to the carrier only in case he is negligent or in default, so that in a case of fortuitous loss or inevitable accident, it is ineffective to create any right to the shipowner in the policy of insurance on cargo. It is only when he or his servants fail in duty to their employer, that the shipowner becomes entitled to indemnity from an underwriter on cargo with whom he has no transaction; and the underwriters on the vessel, if they have undertaken to indemnify him from the consequences of his servant's neglect to other interests as well as his own (as in the case of insurances with the collision clause) become absolved, reversing the understood rules of adjustment of losses between two classes of insurers.

It was pointed out by the ablest of English judges (JESSEL, M. R., in L. R., 5 Ch. Div. 509), that in such adjustments one must treat the merchant and his insurers as one party, and the ship or warehouseman and his insurers as another party, and adjust the indemnity according as liability or otherwise is incurred by the insured bailee for the loss. Now this result seems necessarily to follow in the law of

marine insurance. If any sacrifice of cargo or salvage expenses to cargo are incurred arising from negligent navigation, such sacrifice and expenses must, under the terms of this clause, be borne by the insurers of the cargo sacrificed, because, by the law merchant, all expenses incurred by the shipowner's fault, entail full liability on the shipowner, and are, therefore, excluded from general average; so that by virtue of this clause in the bill of lading, as soon as the liability of a shipowner for such default is established, it is to be borne by the insurers on cargo; such expenses when excluded from general average, will be thrown on the insurers of the cargo and the insurers on hull escape all contribution for a loss which otherwise the law, for reasons of the highest policy, throws on the shipowner alone; while therefore a fortuitous accident gives rise to a general average contribution, negligent navigation throws the whole loss on the insurers on cargo. Is not this a premium on negligence?

The result of this decision must give rise to difficulties in applying the law of damages arising from collision, which, in the case of cargoes, are generally insurance losses. Steamships also now generally carry policies with the collision clause indemnifying them from the consequences to their cargoes, and also to other vessels and their cargoes when the vessel is in fault.

The American rule differing from that of England, is that in collision the cargo does not share in the fault of the ship, so that although the ship may be condemned in half damages the cargo owner recovers in full the loss, being apportioned between the two vessels: *The Milan*, Lush. R. 398; *The Alabama & Gamecock*, 92 U. S. 195. For this reason the cargo is called "innocent," as not sharing in the fault of its carrier vessel. The effect of this clause in the ship's bill of lading will give rise to curious results. In case the carrier ship is condemned in half damages it is adjudged to pay one-half of the loss of its cargo in contribution with the other ship; now as its own liability to that extent is, by the terms of this bill of lading, indemnified out of the insurance on its cargo, the insurer on the hull of the vessel escapes the payment of that part of the loss he has agreed to pay. The insurers of the "innocent cargo" pay the whole loss, and the "guilty" vessel, as it is termed, and its insurer against collision escape. The same result also follows if the carrier vessel is wholly in fault. The terms "innocent" and "guilty" are singularly out of place in describing such subjects of insurance,

and should be eliminated. Fault at sea will produce almost absolutely different consequences from those on the land.

This may appear to be casuistry: the results seem so violently wrong that these conclusions may be escaped by some course of ratiocination which is not apparent. The fallacy is, however, in the first step of the reasoning, which, by giving the shipper the right to destroy the insurer's right of subrogation without his assent or knowledge (a right given by law to every surety who indemnifies his principal), has not seen the consequences which follow in a commercial system which has been the work of years.

It is the first step which counts—the rest reasonably follows as soon as it is determined that an insurance of goods is a right in the *res*, which follows the goods into whosoever hands the title comes, whether by assignment for a consideration or acquired by paying for a wrongful act of destruction. This, if correct, is a new view of the contract. Barratry of the master or an act of spoliation will create liability on the part of the shipowner, and must therefore be paid for by the insurers of the cargo; it is to be hoped that liability occasioned by unseaworthiness will not also be visited on the insurers of cargo.

The judicial mind has, with one exception, in this long controversy throughout the many phases it has assumed, been so single-minded as to the effect of this clause in the shipper's contract, that there may be a vice in these views which has not been seen by the writer. The results of the litigation by which the underwriter has been compelled to bear losses he did not contract to pay, in the struggle by the carriers to escape payment for losses for which they are liable, suggests the saying in regard to the naval action of Navarino, that "it was a very good fight, only the wrong man was knocked down."

MORTON P. HENRY.

Philadelphia.

RECENT AMERICAN DECISIONS.

United States Circuit Court, Eastern District of Wisconsin.

CRANDAL *v.* ACCIDENT INS. CO. OF NORTH AMERICA.

Where one whose judgment and will are overthrown by insanity, takes his own life by hanging himself, his act is not "suicide," within the meaning of that word as used in accident policies of insurance, nor are his injuries considered "self-inflicted," or his death "caused wholly or in part by infirmity or disease." It is considered to

have been caused by injuries "effected through external, accidental and violent means."

Where the last of several successive causes has produced an effect, the law will not regard the cause of that cause.

Where an application for insurance differs from the policy issued thereon, it is not considered a part thereof, and admissions by the assured in his application as to the extent of the insurance do not limit the insurer's liability.

AT LAW. Motion for a new trial in suit on an accident policy of insurance.

House, Fry & Rabb, for plaintiff.

Thomas Bates, for defendant.

The opinion of the court was delivered by

DYER, J.—On the 23d day of May 1884, the defendant company issued to Edward M. Crandal, since deceased, an accident policy of insurance, by which it promised to pay to the plaintiff, who was the wife of the insured, the sum of \$10,000, within thirty days after sufficient proof that the insured, at any time within the continuance of the policy, had sustained bodily injury effected through external, accidental and violent means, within the intent and meaning of the contract and the conditions thereunto annexed, and such injuries alone had occasioned death within ninety days from the happening thereof. It was provided in the policy that the insurance should not extend to death or disability, "which may have been caused, wholly or in part, by bodily infirmities or disease." Further, that no claim should be made under the policy if the death of the insured should be caused by suicide or self-inflicted injuries.

While this policy was in force, the insured, Edward M. Crandal, took his own life by hanging, and the jury, to whom the case was submitted for a special verdict on the facts, has found that at the time of the act of self-destruction he was insane. The question reserved for consideration by the court, and now to be determined, is, whether the death was one covered by the policy. The question of liability, as it here arises upon an accident policy of insurance, seems to be one of first impression. Unaided by direct authority, the court is called on to determine: *First*. Whether under such a policy as this, death from self-destruction, occurring when the insured is insane, may be said to have been caused by bodily injuries effected through accidental means. This question, it will be understood, is here to be considered independently of the question

whether disease or physical infirmity was a promoting cause of death.

The verdict of the jury was unquestionably right. The case was one in which the evidence clearly established the fact of insanity. The symptoms of a disordered mind were manifested in the countenance, conduct and conversation of the insured. He was sleepless, was sometimes unduly excited, then unnaturally depressed. He suffered to such an extent from melancholy that he abandoned his accustomed habits and pursuits. Fondness for family and friends changed to indifference, and, in short, his reasoning powers and self-control appear to have been prostrated by the fear of want, and by morbid impulses and delusions, such as in this species of insanity impel to self-destruction. Upon the facts shown, the jury might well find that his judgment, his volition, his will, were overthrown, so that in the language of Mr. Justice NELSON, when Chief Justice of New York, in the case of *Breasted v. Farmers' L. & T. Co.*, 4 Hill 73, 75, "The act of suicide was no more his act in the sense of the law than if he had been impelled by irresistible physical power." Upon the verdict and the facts which sustain it, it may then be assumed that when the deceased took his life it was not his voluntary rational act. He could not exercise his natural powers of volition, and thereby control his judgment upon the act he was about to commit. The physical violence, therefore, which terminated his life, was the same as if it had come upon him from sources outside of himself, and for which he was not responsible. It was force emanating, not from the brain and hand of Edward M. Crandal, as a responsible voluntary agent, but force which was uncontrollable so far as he was concerned. The means employed to produce death were external and violent. Were they not also in a just and true sense accidental, if the deceased was so far bereft of his reasoning faculties that his act was not the result of his will, or of a voluntary operation of his mind? If, in consequence of his condition of irresponsibility, the violence which he inflicted upon himself was the same as if it had operated upon him from without, why was not the death an accident within the definition of the term as given by Bouvier, namely, "an event which under the circumstances is unusual and unexpected by the person to whom it happens. *The happening of an event without the concurrence of the will of the person by whose agency it was caused*"?

No case has been cited where the question, as here presented,

was directly in judgment; but there are *dicta* which afford some aid in reaching a conclusion. In 7 Amer. L. Rev. 587, 588, various definitions of an accident, as the term is used in insurance policies, are given, namely: "An accident is any event which takes place without the oversight or expectation of the person acted upon or affected by the event:" *Ripley v. Ry. Passengers' Assurance Co.*, 2 Bigelow's Cases 738; *Providence Life Ins. Co. v. Martin*, 32 Md. 310. "It is any unexpected event which happens as by chance, or which does not take place according to the usual course of things:" *N. Am. Ins. Co. v. Burroughs*, 69 Penn. St. 43. "It is something which takes place without any intelligent or apparent cause, without design, and out of course:" *Mallory v. Travelers' Ins. Co.*, 47 N. Y. 52. "Some violence, casualty or *vis major* is necessarily involved" in the term accident. It means, in short, in insurance policies, "any injury which happens by reason of some violence, casualty or *vis major* to the assured without his design or consent or voluntary co-operation." Similar definitions are given by Mr. Justice PAINE in his discussion of the question, in *Schneider v. Ins. Co.*, 24 Wis. 30.

In *Scheiderer v. Ins. Co.*, 58 Wis. 14, it was alleged in the pleading, that while the assured, who was travelling in a railway car, "was in a dazed and unconscious condition of mind, and not knowing or realizing what he was doing, he involuntarily arose from his seat and walked unconsciously to the platform of the car, and fell therefrom to the ground;" and it was held that this constituted a good cause of action upon a policy of accident insurance. Here, it is true, the injury resulted from falling from the car; but since the moving cause was the involuntary act of leaving the seat and walking to the platform, the case suggests the inquiry, if, for example, a person in a fit of somnambulism, or in delirium, not knowing or realizing what he is doing, involuntarily inflicts injury upon himself—that is, by means of his own hand—and death ensues, is not such an injury as much the result of accident, as if, in the same circumstances, the injury results from other external forces, such as falling from the platform of a moving train?

In *Hill v. Ins. Co.*, 22 Hun 189, the insured took poison by mistake, and died suddenly. The court said that death occurred through accidental means. The taking of poison was not the result of the will or intention of the person, and was therefore not his voluntary act. It was adjudged, however, that the plaintiff could not

recover, on the ground that the policy contained a clause, that the company should not be liable if death should be caused by taking poison. And this clause was held to exempt the company from liability, whether the poison was taken intentionally or by mistake. In *Pierce v. Travelers' Insurance Co.*, 34 Wis. 395, Mr. Chief Justice DIXON, speaking for the court, in interpreting the clause in the policy in question in that case, referred to instances of death resulting from an act committed under the influence of delirium, as if the person should, in a paroxysm of fever, precipitate himself from a window; or, having been bled, remove the bandages; or, should take poison by mistake; and observed, that deaths thus produced "are more properly denominated deaths by accident than deaths by suicide. * * * Deaths so caused, are held to be deaths by accident within the meaning and purpose of policies of insurance against accident, as where a man negligently draws a loaded gun towards him by the muzzle, or the servant fills the lighted lamp with kerosene, and the gun is discharged, and the lamp explodes." In *Horn v. Life Ins. Co.*, 7 Jur. (N. S.) 673, the court, in passing upon the question, whether a policy of insurance upon life is rendered void by the suicide of the insured, when insane, speaks of such a death as just as much an accident as if the insured had fallen from the top of a house.

In *Breasted v. Farmers' L. & T. Co.*, 8 N. Y. 306, it was observed by the court, that "a death by accident and a death by the party's own hand, when deprived of reason, stand on principle in the same category. In both cases the act is done without a controlling mind."

To maintain the proposition that because his own hand constituted the violent means employed by the insured in taking his life, those means were not external and accidental, it is necessary to take a distinction between force emanating from the insane person himself, and force operating independently from without. I can hardly think there is ground for such a distinction. The injury and the death seem equally fortuitous in both cases, for in neither case is there a concurring will which prompts the act. An insane man burns his own insured property. The insurer is nevertheless liable for the loss, unless its contract expressly exempts it from liability, even in case of such a burning; this, for the reason that the act was not voluntary, or done with the assent, procurement or design of the assured as a rational person: *Karow v. Continental Ins. Co.*,

57 Wis. 56. Although, in the darkness that enveloped his mind, the hand of Edward M. Crandal adjusted the fatal noose, the act was no more attributable to his voluntary agency, than if, as a sane man walking the street in the darkness of night, the same fatality, without co-operation on his part, or even consciousness of danger, had overtaken him. Therefore, it would seem that in the one case as in the other, the death would be attributable to casualty. Additional force is given to this view of the question, when we consider that in cases arising upon life insurance policies decided by the Supreme Court of the United States, it has been repeatedly held that if the insured, while in the possession of his ordinary reasoning faculties, from any motive, intentionally takes his own life, such death is within the proviso on the subject of suicide, and the insurer is not liable. On the contrary, if the insured takes his life when insane, then the death can not be said to be "by his own hand," and the insurer is liable. And so it would seem to follow, that, as in the latter instance, the act of self-destruction is not the act of the party, it must be regarded in a case like the present, as brought about by means which are accidental, because not the result of the concurring will of the insured.

It is to be further observed that in the policy in suit the company declares that it incurs no liability in case of death from suicide or self-inflicted injuries. Thus it appears that the insurer took into consideration the possibility that the insured might voluntarily, and with deliberate intent—that is, as a sane person—take his life, and in such case the death was not to be regarded as covered by the contract, because not effected by accidental means. This is the import of this clause in the policy; but no provision is made against suicide when insane. And this also adds force to the view that the contract is fairly open to the construction contended for by the plaintiff. By the term "self-inflicted injuries," as used in the policy, was not meant injuries inflicted by the insured upon himself when insane, but injuries self-inflicted when capable of rational, voluntary action.

Several cases have been cited by counsel for the defendant. Among them is *Harris v. Travelers' Ins. Co.*, decided by the Superior Court of Chicago in 1868, and referred to in 7 Am. Law Rev. 589; but the point here involved does not seem to have been there raised. The deceased was a fireman, who was accidentally buried under a falling wall, but was soon rescued without apparent

injury, and continued his work for three months, when he took poison. In a suit to recover the insurance on the ground that the accident rendered him insane, it was held that if he was insane on account of the accident, the death was too remote to be covered by the policy, which included only proximate results. It would seem that the plaintiff relied upon the original accident as a ground of recovery, and that was held too remote. Another case cited is *Pollock v. U. S. Mut. Accident Assoc.*, 28 Alb. L. J. 518. But all that was decided in that case was, that the defendant was not liable for a death by poison, because the contract so expressly provided; and in view of that provision it made no difference whether the poison was innocently or intentionally taken. There was no question of insanity involved, and moreover the death was not caused by "external violence," and this was one of the prerequisites to recover as fixed in the contract. In *Bayless v. Travelers' Ins. Co.*, 14 Blatchf. 144, the question of insanity did not arise, and it is on the same line in principle with *Pollock v. U. S. Mut. Accident Assoc.*, *supra*.

On the whole, my conclusion is, that the death of the insured, Edward M. Crandal, resulted from injuries effected through accidental and violent means, within the meaning of the policy in suit.

Second. Still another and equally interesting question remains to be determined. The contention of the defendant is, that the death in this case was caused by bodily infirmities or disease, namely, the insanity of the insured, and therefore that the plaintiff cannot recover. As has been observed, the policy provides that the company shall not be liable if the death be "caused wholly or in part by bodily infirmities or disease." The policy further recites that it is issued in consideration of the warranties made in the application for insurance, and of the premium paid; and in the application signed by the assured, he makes certain statements of fact usual in such cases, the last of which, numbered fifteen, is as follows: "I am aware that this insurance will not extend to * * * any bodily injury happening directly or indirectly in consequence of disease; nor to death or disability caused wholly or in part by bodily infirmities, or by disease; * * nor to any case except when the accidental injury shall be the proximate and sole cause of disability or death." This is not a warranty of any fact. It is, in effect, merely an admission of knowledge on the part of the insured of such limita-

tions of liability as may be declared in the policy. As, therefore, it is to the policy we must look for these limitations, it is observable that the policy does not declare that the insurance shall not extend to any bodily injury, "happening directly or indirectly in consequence of disease;" but only that it shall not extend "to death or disability which may have been caused wholly or in part by bodily infirmities or disease." This, then, is the limitation of liability to be considered as it is expressed in the policy issued and delivered subsequently to the application for insurance, rather than the statements on the subject contained in the application. The fifteenth clause in the application is not referred to in the policy. Wherein therefore it differs from the written contract, it is no part of the contract.

The argument of counsel for the defendant, is, in brief, that insanity is a bodily infirmity or disease; that in ordinary life insurance cases it is regarded and characterized by the courts as a disease, and therefore it is, that insurance companies are held liable in cases of suicide when the insured was insane. Further, that in the case in hand, the act of self-destruction was occasioned by the insanity, and so that within the meaning of the policy, the death was caused by disease. I was much impressed with the force of this argument, and I may use the language of DENMAN, J., in a case hereafter referred to, "but for *Winspear v. Accident Ins. Co.*, 6 Q. B. Div. 42, I am not sure but that I should have thought the company were protected."

It is true that in cases upon life policies, death by an insane suicide is regarded by the courts as death by disease. As it is expressed in *Eastabrook v. The Union Mut. Life Ins. Co.*, 54 Me. 224, "Death by disease is provided for by the policy. Insanity is a disease. Death which is the result of insanity, is death by disease." It is to be borne in mind, however, that this and similar observations are made in a class of cases where the insurance is not special but general, and where the protection which it is intended to afford, covers all diseases and disorders—other than those which may be specially excepted—which result in death. In the case of a life policy it may not matter whether the disease of insanity, or the particular act of self-destruction be regarded as the immediate cause of death. It is the life which is insured, and liability arises when death occurs, unless the death is within one of the specially excepted cases enumerated in the policy. The fact, therefore, that

in such cases it is said that death which is the result of insanity, is death by disease, does not reach the question we have here, which is—what, under the provisions of a policy which covers accidents only, was the cause of death? In the sense of the clauses on the subject in this policy, was the death caused by disease, or by the act of violence in question? Although the words of the policy are “caused *wholly or in part* by bodily infirmities or disease.” I suppose the true inquiry is, what was the actual proximate cause of death? For in law there is but one cause. That is the proximate cause, which may either directly or indirectly produce the result. If the death was caused *in part* by disease, the disease must have been a proximate cause of death.

“One of the most valuable *criteria* furnished us by the authorities,” says Mr. Justice MILLER, in *Ins. Co. v. Tweed*, 7 Wall. 44, “is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened of itself sufficient to stand as a cause of the misfortune the other must be considered as too remote.” In *Ins. Co. v. Trans. Co.*, 12 Wall. 199, it was said by Mr. Justice STRONG, “There is undoubtedly difficulty in many cases attending the application of of the maxim *proxima causa non remota spectatur*, but none when the causes succeed each other in order of time. In such cases the rule is plain. When one of several successive causes is sufficient to produce that effect, the law will not regard an antecedent cause of that cause, or the ‘*causa causans*.’ In such a case there is no doubt which cause is the proximate one within the meaning of the maxim. But when there is no order of succession in time, when there are two concurrent causes of a loss, the *predominating efficient one* must be regarded as the proximate, when the damage done by each cannot be distinguished.”

The cases most nearly in point upon the question here in judgment, are *Reynolds v. Accidental Ins. Co.*, 22 Law T. Rep. (N. S.) 820; *Winspear v. Accident Ins. Co., (Limited)*, L. R., 6 Q. B. Div. 42; *Lawrence v. Accidental Ins. Co., (Limited)*, 7 Id. 216; and *Scheffer v. Railroad*, 105 U. S. 249. Although it may extend this opinion to greater length than is desirable, it seems necessary to give attention to these cases somewhat in detail.

In the *Reynolds Case*, the facts were that Thomas Humphrey effected with the defendant company “a policy of insurance whereby it was declared that if during the continuance of such policy the

said Thomas Humphrey should receive or suffer bodily injury from any accident or violence, in case such accident or violence *should cause the death* of the said Thomas Humphrey within three calendar months after the occurrence of such accident or violence, the full sum of three hundred pounds should be payable to the personal representatives, &c. * * * *Provided also*, and it is hereby expressly agreed and declared that no claim shall be payable by the said company under the policy in respect of death or injury by accident or violence, unless such death or injury shall be occasioned by some external and material cause operating upon the person of the said insured, and unless in the case of death as aforesaid, *such death shall take place from such accident or violence* within three calendar months, &c."

It appeared that Humphrey, while the policy was in force, went into the sea to bathe. While in a pool about one foot deep, he became suddenly insensible from some unexplained internal cause, and fell into the water with his face downwards. A few minutes afterwards he was found lying dead with his face in the water, and water escaped from his lungs in such a manner as to prove that he had breathed after falling into the water. The question for the opinion of the court was, whether the death of Humphrey occurred in a manner entitling the plaintiff as his executor to receive the sum of three hundred pounds under or by virtue of the policy. *Bosanquet*, for the defendant, argued, that "if a man is pushed into the water, or forcibly held down in it, his death then results from violence within the meaning of the policy. If a man accidentally falls into the water and is drowned, his death results from accident; *but if a man falls down in a fit in a shallow pool, and is drowned, his death is the result, not of accident, or of violence, but of the fit*, even though the immediate cause of death be, as here, suffocation by drowning." WILLES, J. said "In this case the death resulted from the action of the water on the lungs, and from the consequent interference with respiration. *I think that the fact of the deceased falling in the water from sudden insensibility was an accident*, and consequently our judgment must be for the plaintiff." It is to be observed of this case, that it has only a general application to the question under consideration, because the proviso in the policy contained no such condition as we have here in relation to disease as a cause, in whole or in part, of death.

In the *Winspear Case*, the facts were, that W. effected an insur-

with the defendants against accidental injury, and by the terms of the policy the defendants agreed to pay the amount insured to his legal representatives, should he sustain "any personal injury caused by accidental, external and visible means," and the direct result of such injury should cause his death. The policy also contained a proviso that the insurance should not extend "*to any injury caused by or arising from natural disease or weakness, or exhaustion consequent upon disease, * * * or to any death resulting from disease, although such death may have been accelerated by accident.*" During the time the policy was in force, and whilst he was crossing a stream, he was seized by an epileptic fit and fell into the stream, and was drowned *whilst suffering from the fit*, but he did not sustain any personal injury to occasion death, other than drowning.

Where it was argued that there would have been no drowning had the insured not had an epileptic fit; that it was the fit which caused the drowning, and that the death, therefore, was from an injury caused by the fit. Just as it is argued in the case at bar, that there would have been no suicide had the insured not been insane; that it was the insanity which caused suicide, and that, therefore, the death was from an injury caused by insanity. But COLERIDGE, C. said: "I am of opinion that this judgment should be affirmed, and that on very plain grounds. It appears to be clear from the facts of the case, that the insured died from drowning in the waters of the brook whilst in an epileptic fit, and drowning has been held to be an injury, because in the words of this policy, caused by accidental, external and visible means." I am, therefore, of opinion, that the injury from which he died was a risk covered by the policy, and the only question then remaining is, whether the death is within the proviso which provides that the insurance "shall not extend to death by suicide, whether felonious or otherwise, or to any injury caused by or arising from natural disease or weakness, or exhaustion consequent upon disease." It is certainly not within the first part of this proviso, because the death was not so occasioned. Neither does it appear to me, that the cause of death was within those latter words of the proviso. *The death was not caused by any natural disease or weakness or exhaustion consequent upon disease, but by the accident of drowning.* I am of opinion, that those words in the proviso mean what they say, and they point to an injury caused by natural disease, as if, for in-

stance, in the present case, epilepsy had really been the cause of the death. The death, however, did not arise from any such cause, and those words have no application to the case, and therefore the judgment of the Exchequer Division must be affirmed." This case, in its facts and upon principle, appears to be directly in point; for if there the death was not in a legal sense caused by the fit, but by the drowning, so here it was not caused by the insanity or disease, but by the act of self-destruction.

In the case of Lawrence, there was a policy of insurance against death from accidental injury, which contained the following condition: "This policy insures payment only in case of injuries accidentally occurring from material and external cause, operating upon the person of the insured, where such accidental injury is the direct and sole cause of death to the insured. * * * *But it does not insure in the case of death arising from fits; * * * or any disease whatever arising before or at the time or following such accidental injury* (whether consequent upon such accidental injury or not, and whether causing such death directly or jointly with such accidental injury)." The insured, while at a railway station, was seized by a fit, and fell off the platform across the railway, and an engine and carriage passed over his body and killed him. The falling forward of the insured off the platform was in consequence of his being seized with a fit or sudden illness, and but for such fit or illness he would not have suffered injury or death.

DENMAN, J., following the authority of *Winspear v. Accident Ins Co.*, held the company liable.

WILLIAMS, J., placed his concurring opinion upon the following grounds: "The whole case depends upon the true construction of the words in the proviso in this case. The deceased person having fallen down suddenly in a fit from the platform of the railway on to the rails, was, while lying there, accidentally run over by a train that happened at that moment unfortunately to come up; and he was undoubtedly killed by the direct external violence of the engine upon his body, which caused his death immediately. The question arises whether, according to the true construction of the proviso, it can be said that this is a case of death arising from fits; because if this death did not arise from a fit, according to the true construction of the policy, the remainder of the clause does not come into existence at all, and is inapplicable. It seems to me that the

known maxim of Lord BACON, which is applicable to all arguments of law, is directly applicable in this case. Lord Bacon's language in his *Maxims of the Law*, Reg. 1, runs thus: "There are infinite for the law to consider the causes of causes, and the impulses one of another. Therefore, it contenteth itself with the immediate cause." Therefore I say, according to the true rule of law, I must look at only the immediate and proximate cause of death; and it has seemed to me to be impracticable to go from cause upon cause, which would bring us back ultimately to the birth of the person, for had he not been born, the accident would never have happened. The true meaning of this proviso is, that if death arose from a fit, then the company are not liable, even if an accidental injury contributed to the death, in the sense that there were both causes which operated jointly in causing it. That is the meaning, in my opinion, of this proviso. But it is essential to the construction that it should be made out that the fit was a cause in the sense of being the proximate and immediate cause of death, before the company are exonerated; and it is not the less true that you can show that another cause intervened and assisted in the causation."

It appears, that although the proviso in the policy in that case was that if the death should arise from a fit, the company should not be liable, even though accidental injury contributed to the death operating jointly with the fit, it was, nevertheless, held essential that the fit was a cause in the sense of being the immediate cause of death, in order to exonerate the company.

Jeff v. Railroad, supra, only has application here by way of analogy. In that case a passenger on a railway car was injured in a collision of trains, and became thereby disordered in mind and some eight months thereafter committed suicide. It was held in a suit by his personal representatives against the railway company, that his own act was the proximate cause of his death, and therefore there could be no recovery.

Although it may be said that Crandal would not have committed suicide had he not been insane, and so that the insanity was a proximate cause of death, upon the reasoning and authority of the cases cited to, the conclusion seems unavoidable that the act of self-destruction must be regarded, within the meaning of the policy, as the immediate and proximate cause of his death. Quite against my first impression when the case was submitted, I am constrained to hold

upon deliberate consideration, that the plaintiff is entitled to recover. If I am wrong in my conclusions, it is a gratification to know that the case is one that may be taken to the Supreme Court for its judgment, and in which the error, if error has been committed, may be there corrected.

Judgment for plaintiff on the verdict.

It is seldom that either a life or accident policy of insurance is issued which does not contain a provision intended to protect the insurer against liability in some or all cases of self-destruction by the assured. In most of the cases in which such provisions have come before the courts, as in the principal case, the question has been as to their application in cases of self-destruction while insane. It has never, perhaps, been doubted by any court, that self-destruction resulting directly from insanity is as much insured against by an ordinary policy of insurance containing no provision on the subject as death resulting from any other disease; and, it is equally well settled that a provision that the company shall not be liable on the policy in case of self-destruction by assured while insane (*Bigelow v. Berkshire Life Ins. Co.*, 93 U. S. 284; *Gorgoza v. Ins. Co.*, 65 N. Y. 232; *Chapman v. Ins. Co.*, 6 Biss. 238; *Knights of the Golden Rule v. Ainsworth*, 17 Rep. 139; or, shall in that event only be liable for a certain sum, less than the amount of the insurance: *Salentine v. Ins. Co.*, 24 Fed. Rep. 159; *Frey v. Ins. Co.*, 52 N. W. Rep. 100) is valid. The difficulty in cases involving the application of provisions concerning self-destruction is in ascertaining the exact meaning of the language used. This difficulty has arisen partially from the fact that words and expressions are frequently employed which have more than one meaning, and partially from there being many degrees and kinds of insanity. As for instance, the word "suicide," as used in criminal law, means criminal self-murder; but in ordinary conversation it is used to cover all

cases of voluntary self-destruction, whether committed while sane or insane. And so also, as to insanity; a man may be so completely insane as to be unable to comprehend the probable result of acts calculated to destroy life, or understand the character of the act of suicide; or, he may be driven to self-destruction by an insane impulse, temporary or otherwise, over which he has no control, and which he is unable to resist, though able, perhaps, to understand both the physical and moral character of his act; or, he may be morally insane so as to be unable to comprehend the moral character of suicide and be otherwise sane, and able to understand its physical character and probable consequences to others, and retain a certain amount of self-control. In any of these or of the many other cases of mental aberration which might be mentioned, the man is in common parlance said to be insane.

In construing provisions exempting insurers from liability in cases of self-destruction, the courts, and especially the American courts, hold that inasmuch as they are prepared by the insurer and provide for a forfeiture, they should always be construed most strongly against the company: *National Bank v. Ins. Co.*, 95 U. S. 673; *Schultz v. Ins. Co.*, 40 Ohio St. 217; *Ins. Co. v. Groom*, 86 Penn. St. 92.

CONSTRUCTION OF PARTICULAR PHRASES.—"Die by his own hand;" "Die by his own hand or act;" Shall under any circumstances die by his own hand;" "Die by suicide" and "Commit suicide," are synonymous phrases: *Ins. Co. v. Terry*, 15 Wall. 580; *Schultz v. Ins. Co.*, 40 Ohio St. 217; *Breasted*

idental death.—In the first place, it may be noted that such phrases do not cover cases of accidental self-destruction. An intention to kill must be coupled with the fatal act: *Ins. Co. v. Sedgwick*, 41 Ga. 338. This has been held to be so, where the expressions used are much broader than the above, as in *Insurance Co. v. Commonwealth*, 100 Ky. 1, 18 Ky. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896,

Breasted v. Farmers' Loan and Co., 4 Hill 73 (1843), the suit was a policy of insurance on the life of comfort. The policy contained a providing that, in case the assured died upon the seas, &c., or by his hand, or, in consequence of a duel, the hands of justice, &c., the policy

This is the earliest American case in point, and the language there used by the learned chief justice has recently been quoted with approval by the Supreme Court of the United States: *Manhattan Life Ins. Co. v. Broughton*, 109 U. S. 121, 131 (1883), and is believed by the writer to be a correct exposition of the law as it now stands, both in this country and England. Wherever a man is driven to the act of self-destruction by an insane impulse which he is powerless to resist, or where he takes his own life while unconscious of the physical nature of the act, his will is considered silent, and his act outside of the meaning of the word "suicide" and the synonymous expressions: *Banks v. Ins. Co.*, 5 Big. Life & Acc. Ins. Rep. 481; *Ins. Co. v. Rodel*, 95 U. S. 232; *Newton v. Ins. Co.*, 76 N. Y. 426; *Hathaway v. Ins. Co.*, 48 Vt. 335; *Eastbrook v. Ins. Co.*, 41 Me. 224; *Waters v. Ins. Co.*, 2 Fed. Rep. 892; *Weed v. Ins. Co.*, 41 N. Y. (Sup.

Ct.) 476; *Knickerbocker Life Ins. Co. v. Peters*, 42 Md. 414; *Ins. Co. v. Moore*, 34 Mich. 41. Contra, *Cooper v. Life Ins. Co.*, 102 Mass. 227.

Borradaile v. Hunter, 5 Manning & Gr. 639 (1843), is the leading English case upon this subject. The question there was as to the effect of moral insanity upon the insurer's liability. The policy sued on provided that in case the assured "shall die upon the seas, or go beyond the limits of Europe, or enter into or engage in any naval or military service whatsoever, unless license be obtained from a court of directors of the said society, or shall die by his own hands, or by the hands of justice, or in consequence of a duel," it should be void. The jury returned a verdict "that Mr. Borradaile voluntarily threw himself from the bridge with the intention of destroying life; but at the time of committing the act he was not capable of judging between right and wrong;" and a verdict was thereupon entered for the defendant. Upon appeal, it was held that this was correct, and that the mere fact of the assured's inability to judge between right and wrong was immaterial. This case has sometimes been referred to as authority for the proposition that where a person takes his own life intentionally it is to be considered a voluntary act and a death "by his own hand," within the meaning of the phrase as used in policies of insurance, whether the act is the direct result of insanity or not; but, as will be observed, it does not go that far. See *Clift v. Schwabe*, 3 Com. B. 437; *White v. Ins. Co.*, 38 L. J. Ch. (N. S.) 53.

In this country it has been followed in New York: *Van Zandt v. Ins. Co.*, 55 N. Y. 169; *Fowler v. Ins. Co.*, 4 Lans. 202; *Weed v. Life Ins. Co.*, 41 N. Y. (Sup. Ct.) 476. See, also, dictum in *Hathaway v. Ins. Co.*, 48 Vt. 335.

And the Supreme Court of Massachusetts has gone beyond it, and holds that where a policy provides that it shall be

void in case the assured shall "die by suicide," and he takes his own life, knowing what the physical result of the act will be, that the policy will be avoided, even where the assured is impelled to the act by insanity: *Cooper v. Life Ins. Co.*, 102 Mass. 227.

Rule in Terry's Case.—In a large majority of the cases the courts of this country have refused to follow *Borradaile v. Hunter*, and hold that in order to constitute death by the assured's hand or act, the fatal act must be directed by the sane will of a mind capable of distinguishing between right and wrong, a knowledge of good and evil being considered as necessary to complete volition, as knowledge of the physical character of an act of self-destruction.

The leading case in favor of this view is *Life Ins. Co. v. Terry*, 1 Dill. 403; s. c. 15 Wall. 580 (1872), which was a suit upon a policy providing that "if the said person whose life is hereby insured * * * shall die by his own hand * * * this policy shall be null and void." The case was tried in the Circuit Court by a jury, before Mr. Justice MILLER and DILLON, Circuit Judge. Evidence was introduced tending to show that the assured died from the effect of poison taken while insane. The defendant's counsel requested the court to instruct the jury. "Second. That if the jury believe from the evidence that the self-destruction of the said George Terry was intended by him, he having sufficient capacity at the time to understand the nature of the act which he was about to commit, and the consequences which would result from it, then, and in that case, it is wholly immaterial in the present case that he was impelled thereto by insanity, which impaired his sense of moral responsibility, and rendered him, to a certain extent, irresponsible for his actions."

The court refused to give the instruction, and charged, concerning the degree of insanity necessary to withdraw the act from the provision of the policy,

ws: "It is not every kind or f insanity which will so far ex- party taking his own life as to e company insuring liable. To the act of self-destruction must n the consequence of the insan- the mind of the decedent must en so far deranged as to have n incapable of using a rational ut in regard to the act he was ng. If he was impelled to the an insane impulse, which the at was left him did not enable sist, or if his reasoning powers e far overthrown by his mental that he could not exercise his g faculties on the act he was do, the company is liable. On hand, there is no presumption *prima facie* or otherwise, that uction arises from insanity, and elieve from the evidence that ent, although excited or angry sed in mind, formed the deter- to take his own life, because, xercise of his usual reasoning he preferred death to life, then any is not liable, because he is own hand within the meaning licy."

ary found for the plaintiff, and judgment accordingly. The t took the case to the Supreme here the judgment below was In delivering the opinion of Mr. Justice HUNT said: "We rule on the question before us to If the assured, being in the a of his ordinary reasoning from anger, pride, jealousy, or o escape from the ills of life, ally takes his own life, the pro- bes, and there can be no reco- the death is caused by the y act of the assured, he know- tending that his death shall be t of his act; but when his g faculties are so far impaired is not able to understand the racter, the general nature, con-

sequences and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse, which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable."

This rule has been criticised, both as lacking in clearness and as being uncalled for by the facts of the case (*Van Zandt v. Ins. Co.*, 55 N. Y. 269), but it does not appear to the writer open to either objection, and it has been approved and followed in later cases which have come before the same tribunal: *Ins. Co. v. Rodol*, 95 U. S. 232; *Ins. Co. v. Broughton*, 109 U. S. 121.

The meaning of the rule in *Terry's case* is made plainer, if possible, by what was said by Mr. Justice GRAY in *Ins. Co. v. Broughton*. In delivering the opinion of the Supreme Court in that case, he said that an act of self-destruction is not to be considered the act of the assured when his "reason is so clouded or disturbed by insanity as to prevent his understanding the real nature of the act as regards either its physical consequences or moral aspect."

The rule in *Terry's Case* has been adopted in Georgia: *Life Ass. of Am. v. Waller*, 57 Ga. 553. Tennessee: *Phadenhauer v. Ins. Co.*, 7 Heisk. 567. Michigan: *Ins. Co. v. Moore*, 34 Mich. 41. Ohio: *Schultz v. Ins. Co.*, 40 Ohio St. 217, and Pennsylvania: *Ins. Co. v. Groom*, 86 Penn. St. 92; *Ins. Co. v. Iselt's Adm'r.*, 74 Id. 176.

PHRASES EMBRACING INSANE SELF-DESTRUCTION.—"Die by his own hand sane or insane:" *Gogorza v. Ins. Co.*, 65 N. Y. 232. "Die by his own act or intention, whether sane or insane:" *Adkins v. Ins. Co.*, 70 Mo. 27. "Die by suicide, sane or insane:" *Bigelow v. Ins. Co.*, 93 U. S. 284. "Die by suicide, felonious or otherwise, sane or insane:" *Pierce v. Ins. Co.*, 34 Wis. 389; and die by "self-destruction, felonious or otherwise:" *Riley v. Hartford Life & Annu-*

ity *Ins. Co.*, 25 Fed. Rep. 315 ; see also dictum in *Bigelow v. Ins. Co.*, 93 U. S. 284, 288, are synonymous expressions and include all cases of voluntary self-destruction, with an understanding of the physical character of the act, whether the act is the result of an insane condition of the assured's mind or not.

PRESUMPTIONS.—Evidence.—Where a person is found drowned without any marks of violence on his person, that fact is, of itself, no evidence of suicide : *Ins. Co. v. Delpuch*, 82 Penn. St. 225 ; nor is the fact that the deceased was a spiritualist and believed he would enjoy the pleasures of this life in the next, admissible in evidence under such circumstances to establish suicide : *Ins. Co. v. Delpuch*, *supra*.

The presumption is ordinarily in favor of a natural death : *Hancock v. Ins. Co.*, 34 Mich. 42 ; *Ins. Co. v. Hogan*, 80 Ill. 35.

In *Terry's Case*, Mr. Justice MILLER

instructed the jury, as we have seen, that "there is no presumption of law, *prima facie* or otherwise, that self-destruction arises from insanity," and the rule, as stated by him is supported by the cases : *Weed v. Ins. Co.*, 41 N. Y. (Sup. Ct.) 476 ; *Phadenhaur v. Ins. Co.*, 7 Heisk. 567 ; *Coffey v. Ins. Co.*, 35 N. Y. (Sup. Ct.) 314.

In *Schultz v. Ins. Co.*, 40 Ohio St. 217, it was held that the presumption in case of suicide, is that it was committed while sane ; but the true rule is probably as suggested in a New York case, that there is no presumption either way : *Coffey v. Ins. Co.*, 35 N. Y. (Sup. Ct.) 314. In two cases it has been held that where there is other evidence of insanity the fact of suicide may be considered in connection with that evidence : *Scheffer v. Life Ins. Co.*, 25 Minn. 534 ; *Weed Ins. Co.*, 35 N. Y. (Sup. Ct.) 386.

BENJAMIN F. REX.

St. Louis, Mo.

Supreme Court of Minnesota.

HAMMOND v. PEYTON, ASSIGNEE.

As a general rule, the equitable lien of the grantor of real estate for the price thereof is not assignable, although there may be exceptions to this rule in favor of persons who merely stand as representatives of the grantor.

The lien itself is not in accordance with the policy of the law, and should be restricted rather than fostered.

APPEAL from an order of the District Court, Saint Louis county.

The opinion of the Court was delivered by

BERRY, J.—The equitable lien of a grantor for the price of real estate has been recognised by this court in *Selby v. Stanley*, 4 Minn. 65, Gil. 34 ; *Doughaday v. Paine*, 6 Minn. 443, Gil. 304 ; *Duke v. Balme*, 16 Id. 306, Gil. 270 ; and *Walter v. Hanson*, 24 N. W. Rep. 186.

But whether the lien is assignable, or whether, if assignable, it passes upon the transfer of the debt which it secures as an incident

proof, and without any express or formal assignment, has not been determined. It is to be regretted that the idea of a grantor's lien was ever admitted, especially in this country, where registration of transactions affecting real estate is so generally provided for and practised. It is, however, recognised in England, and in a majority of the states of the Union, though it is utterly repudiated in several, and in others has been abolished by statute. See 3 Am. Eq. Jur. § 1249; Bisp. Eq. 353; Tiedm. Real Prop. 292, and cases.

In *Mackreth v. Symmons*, 15 Ves. 329, the leading case, Lord Eldon appears to look upon the doctrine of lien with disfavor; and see in the same direction, *Kettlewell v. Watson*, 21 Ch. Div. 1; and, in this country, we find still more emphatic protests against it, and regrets that it should have ever been allowed to gain footing: *Bayley v. Greenleaf*, 7 Wheat. 46, MARSHALL, C. J.; *Wiggs v. Hill*, 6 How. (Miss.) 362; 3 Pom. Eq. Jur. 256, note; *Simpson v. Munde*, 3 Kan. 172; *Philbrook v. Delano*, 29 Vt. 410; SHEPLEY, C. J.; *Ahrend v. Odiorne*, 118 Mass. 261, LAY, C. J.; *Kauffelt v. Bower*, 7 S. & R. 64, GIBSON, J.; *Welch v. Bonner*, 9 Ga. 82. Perhaps one of the strongest indorsements of the doctrine is found in *Manly v. Slason*, 21 Vermont, by REDFIELD, C. J., in 1849; but in 1851 it was utterly struck out by the legislature of that state. "As to its origin and rationale," says Mr. Pomeroy, 3 Eq. Jur. 1252, citing many authorities, "there has been a great diversity of opinion. It has been accounted for as a trust, as an equitable mortgage, as arising from a natural equity, and as a contrivance of the chancellors to evade the unjust rule of the early common law by which land was taken from the claims of simple contract creditors." And this author, rejecting all these theories himself, accounts for it as an instance of "higher importance, consideration and value given to real than to personal property." And in sect. 1251 of the same work it is said, that "no other single topic belonging to equity jurisprudence has occasioned such a diversity, and even discord, of opinion among the American courts as this of the grantor's lien. Upon nearly every question that has arisen as to its operation, its transfer or discharge, the parties against whom it avails, and the parties in whose favor it exists, the decisions in different states, and sometimes even in the same state, are directly conflicting. It is practically impossible to formulate any general rule representing

the doctrine as established throughout the whole country." See cases cited. See also, 1 Perry Trusts 234.

We have referred to these matters for the purpose of showing the standing of the doctrine of a grantor's lien, and the disposition and tendency of the courts and of legislation towards it, and contenting ourselves with a reference to the authorities already cited, without here entering into a detailed presentation of them, we feel warranted in saying, that this disposition and tendency is at least not to extend the doctrine beyond what may be regarded as the comparatively well settled and established rules of equity in reference to liens of this kind. In other words, the doctrine is not one to be fostered and encouraged, or allowed to spread, but rather to be kept strictly within limits; and this upon the grounds that it is unnecessary for the protection of a grantor, who may readily, cheaply, and conveniently secure himself by a mortgage which can be put upon record; that the lien is in the nature of a secret and invisible trust, and therefore opposed to the policy and spirit of our registration system; that a sale subject to it is calculated to give a false appearance of credit, and that it is contrary to the spirit and policy of our laws, which favor the free transmission of real estate under such conditions that a purchaser may, with reasonable certainty, know what is the precise state of the title which he acquires, and without being subject to the doubt and uncertainty which will be occasioned by such questions as whether there was a grantor's lien, or whether, if there was one, it has been waived or discharged, and whether it has been assigned or not, or whether, if assigned, it still continues; all questions *dehors* any record.

The application of the foregoing considerations, which we propose to make in this case, will appear hereafter. We have been unable to find any adjudication in the English courts (where the doctrine of vendors' lien originated), squarely to the effect that a grantor's lien is assignable. The case of *Dryden v. Frost*, 3 Mylne & C. 670, cited by counsel and by many text-writers, does not, in our judgment, go to that extent. While there is in this country a diversity of opinion, in most of the states the lien is held to be personal to the grantor and not assignable, and it would, of course, follow that in those states the transfer of the debt, either with or without an assignment of the lien, would not pass the lien to the transferee. This result of the authorities in this country may be verified by reference to the cases cited in 3 Pom. Eq. Jur.,

4, note; and see also, 1 Lead. Cas. Eq., 4th Am. ed. 492; n. Real Prop., § 294; 2 Sugd. Vend. 398, note by Perkins; Eq., § 356; *Philbrook v. Delano*, 29 Me. 410; *Ahrend v. ...*, 118 Mass. 261; *Simpson v. Mundee*, 3 Kan. 172; *Baum ...*, 21 Cal. 173; *Welborn v. Bonner*, 9 Ga. 82; *Briggs ...*, 6 How. (Miss.) 362; 1 Jones Mort., § 212. In this conclusion of authority as to the assignability of grantor's liens, we proceed in accordance with the consideration before mentioned, to adopt for this state the rule which is certainly sanctioned by a great weight of authority, and which comports itself to our judgment as most wholesome, best calculated to promote the general interest, and most in accordance with the spirit and policy of our laws; and this is in the direction of restricting rather than extending the scope of the lien. We therefore hold that a grantor's lien is not generally assignable. We are not, however, to be understood as holding that it may not descend to the grantor's representative, nor that it may not pass to his assignee for the benefit of the creditors, nor that there may not be some other mode in which it may pass to some person who may be regarded as acting for the grantor and his interest, and not as acting solely for himself.

It may be suggested that the conclusion which we have reached is inconsistent with analogies of the law; but to this it may well be answered that this lien is a mere creature of equity, and therefore entitled to be recognised only as equity has created it and as it is. From this, the considerations before presented distinguish it from such liens as, instead of being disfavored, are favored in law; for instance, mechanics' liens. These being created by statute, without restrictions as to assignability, must be regarded as favored by law, and therefore entitled to beneficial construction. This distinguishes the case; but we may add, that if there were any doubt as to the correctness of our conclusion, it is by no means clear that the facts of plaintiff, claimed to amount to a waiver, would not lead to the same result.

Order sustaining the demurrer affirmed.

The question of the assignability of a grantor's or grantor's lien is in inextricable confusion in this country. The distinction between a vendor's lien and a grantor's lien has been lost sight of or ignored. The grantor's lien is

equitable, exists only in equity jurisprudence, and is of purely equitable cognisance. The entire legal estate and the actual possession vests in the grantor. Thus there are two classes of cases: 1. Where there is an absolute deed given

which conveys away the legal title. 2. Where only a bond for a deed is given to convey when the purchase-money is paid. The vendor who retains his legal title and merely gives his bond to convey is in a very different condition in regard to the land he has sold than he who has made an absolute deed conveying away the legal title. When the legal title is retained, the transaction on its face shows that it is the intention to hold such title as security. It is equivalent to conveying the land and taking a reconveyance by way of mortgage. In such a case the question of want of notice cannot arise, for he who purchases from one whose only title is a bond to convey, must know the rights of the original holder or be guilty of such negligence as is evidence of fraud. It will be seen that the doctrine of the cases which hold that the assignee of a note given for the purchase-money of land does not acquire the lien which the vendor himself had, can have no application to cases where the legal title does not pass.

The vendor's lien is held to be non-assignable in Arkansas, California, Georgia, Illinois, Iowa, Maryland, Mississippi, Missouri, North Carolina, New York, Ohio and Tennessee. Where an express assignment is thus forbidden, it follows that an equitable assignment by way of subrogation is impossible. Where by express arrangement the purchase-money note is given to a third person, instead of the grantor, such person is generally held entitled to the lien: *Mitchell v. Butt*, 45 Ga. 162; *Nichols v. Glover*, 41 Ind. 24; *Hamilton v. Gilbert*, 2 Heisk. 680; *Francis v. Wells*, 2 Col. 660; *Perkins v. Gibson*, 51 Miss. 699; *Lathan v. Staples*, 46 Ala. 462; *Campbell v. Rouch*, Id. 667.

In a note to the leading case of *Mackreth v. Symmons*, 1 Lead. Cas. in Eq. 494, it is said: "It seems to be settled that if a debt is secured by an express lien, as where there is an agree-

ment for a lien which creates an equitable mortgage, or where the vendor has not parted with the legal title, an assignment of the debt entitles the assignee to the benefit of the pledge: *Graham v. McCampbell*, Meigs 52; *Eskridge v. McClure*, 2 Yerg. 84; *Tanner v. Hicks*, 4 S. & M. 294. In some states it appears to be settled that there is no distinction between an express and implied lien as to transferability, and that an assignment of the note or bond for the purchase-money carries the lien: *Kenny v. Collins*, 4 Little 289; *Johnston v. Gwothmey*, Id. 317; *Eubank v. Pater*, 3 Mon. 285; *Edwards v. Bokannon*, 2 Dana 95; *Honore v. Bakewell*, 6 B. Mon. 67; *Ripperdon v. Cozinc*, 8 Id. 465; *Fisher v. Johnson*, 5 Ind. 492.

Arkansas: The existence of the vendor's lien was recognised in *Schall v. Biscoe*, 18 Ark. 142; *Lavender v. Abbott*, 30 Id. 192. The vendor's lien cannot be transferred by assignment or by subrogation: *Schall v. Biscoe*, 18 Ark. 142; *Hutton v. Moore*, 26 Id. 382. The law from the time the memory of man runneth not to the contrary has been that the vendor's lien was personal and not assignable: *Jones v. Dos*, 2 Ark. 519; not assignable unless under some peculiar circumstances: *Crawley v. Riggs*, 24 Ark. 563; *Carlton v. Buckner*, 28 Id. 66; *Moore v. Andres*, 14 Id. 634; *Blevin v. Rogers*, 32 Id. 258; may be enforced by the heirs of the vendor: *Lavender v. Abbott*, 30 Id. 192.

Georgia: In *Wellborn v. Williams*, 9 Ga. 86, NISBET, J., after a careful examination of many of the authorities, held that the mere assignment of the purchase-money note did not carry the lien. "The vendor's is a secret, invisible, unregistered lien. We are wholly disinclined to extend it to the assignee of the notes;" followed in *Webb v. Robinson*, 14 Ga. 216. Lien abolished by statute: Code of Ga. 1873, sec. 1997.

Maryland: Vendor's lien recognised in *Magruder v. Peter*, 11 Gill & J. 217;

rr v. Hobbs, 11 Md. 285. Held not assignable: *Dixon v. Dixon*, 1 Md. Ch.; *Inglehart v. Arminger*, 1 Bland's 519; *Moreton v. Harrison*, Id. . In *Schnebly v. Ragan*, 7 Gill & 124, the court inclined to the belief that the assignee might get the benefit of the lien by express agreement, but held that where the vendor assigned the purchase-money note "without reserve," the lien, being personal, was extinguished.

Missouri: Lien recognised in *Marsh Turner*, 4 Mo. 553; *Delassus v. Weston*, 19 Id. 425; not assignable: *Carl v. Heervey*, 70 Mo. 160; except where the vendor retains the legal title: *Wans v. Cnoherd*, 30 Id. 459.

Ohio: Lien recognised in *Williams v. Roberts*, 5 Ohio 35; *Anketel v. Converse*, 17 Ohio St. 11; held not assignable in *Brush v. Kinsley*, 14 Ohio 20; *Worton v. Horner*, Id. 437; *Jackman v. Block*, 1 Id. 318.

Tennessee: Lien recognised in *Eskridge v. McClure*, 2 Yerg. 84; *Ross v. Wilson*, 6 Id. 50; not assignable: *Grant v. Davis*, 10 Heisk. 522; *Tharpe v. Dunlap*, 4 Id. 674; transfer of the purchase-money note extinguishes the lien: *Gann v. Chester*, 5 Yerg. 205. *De Claiborne v. Crockett*, 3 Id. 27; *Waham v. McCampbell*, Meigs 52; *Green v. Demoss*, 10 Humph. 371.

Iowa: The assignee of a note given for the purchase-money of land cannot in equity enforce the original lien of the vendor against the land: *Dickenson v. Case*, 1 Morris 492; *Crow v. Vane*, 4 Iowa 436. Lien recognised in *Granger v. Feervary*, 9 Iowa 163; *Wanston v. McCrew*, 43 Id. 555. Must be reserved by way of mortgage or other duly executed instrument: Rev. Stat. 1873, sec. 1940.

Illinois: Vendor's lien recognised in *Terter v. Martin*, 4 Scam. 148; *Keith v. Horner*, 42 Ill. 524; *Kirkham v. Boswell*, 67 Id. 599; *Moshier v. Meek*, 80 Id. 79; but is personal and cannot be

assigned: *Small v. Stogg*, 95 Ill. 39; *Wing v. Goodman*, 75 Id. 159; *Moshier v. Meek*, 80 Id. 79; *Carpenter v. Mitchell*, 54 Id. 126; *Richards v. Leum-ing*, 29 Id. 431. Will pass to personal representative, but cannot be made the subject of sale or transfer by contract: *Keith v. Horner*, 32 Ill. 534; *McLaurie v. Thomas*, 39 Id. 291; *Dayhuff v. Dayhuff*, 81 Id. 499. Assignment of the note destroys the lien: *Moshier v. Meek*, 80 Ill. 79. Lien is not assignable even by express language: *Markoe v. Andreas*, 67 Ill. 34; but it may be made assignable by an express reservation in the deed, which when recorded is in effect a mortgage: *Carpenter v. Mitchell*, 54 Ill. 126.

California: Lien recognised in *Salmon v. Hoffman*, 2 Cal. 138; *Gallagher v. Mars*, 50 Id. 23. In *Baum v. Grigsby*, 21 Cal. 173, FIELD, J., said: "The cases which deny that the lien passes with the personal security of the vendee do not rest, except in a few instances, upon the want of a special assignment from the vendor, but upon the ground that the lien is in its nature unassignable. There is a marked distinction between the lien of a vendor, after absolute conveyance, and the lien of a vendor where the contract of sale is unexecuted. In the latter case the vendor holds the legal estate as security for the purchase-money; he can assign his contract with the conveyance of the title, and in such case the assignee will acquire the same rights and be subject to the same liabilities as himself: *Sparks v. Hess*, 15 Cal. 194; *Taylor v. McKinney*, 20 Id. 618. In the former case the vendor retains a mere equity, which to become of any force or effect must be established by the decree of the court: *Lewis v. Covilland*, 21 Cal. 179; *Williams v. Young*, Id. 227; *Porter v. Brooks*, 35 Id. 199; *Ross v. Heintzen*, 36 Id. 313.

New York: Lien recognised in *Warner v. Alstyne*, 3 Paige 513; *Chase v.*

Peck, 21 N. Y. 581; *Stafford v. Van Rensselaer*, 9 Cow. 316; *Garson v. Green*, 1 Johns. Ch. 308; *Smith v. Smith*, 9 Abb. Pr. N. S. 420. In *White v. Williams*, 1 Paige 502, Chancellor WALWORTH held that the vendor's lien did not pass by implication to the assignee of the note, but intimated that it might be transferred by special agreement. See *Smith v. Smith*, 9 Abb. Pr. N. S. 420. In *Hullock v. Smith*, 3 Barb. 272, STRONG, J., said: "If the note or bond is assigned or transferred to a third person for his benefit, the security is gone forever. The reason is, there is no peculiar equity in favor of third persons. But that does not apply where, as in this case, the transfer is only for the purpose of paying the debt of the vendor, so far as it may be available, and is therefore for his benefit; there the equity continues."

Mississippi: The existence of lien recognised in *Dodge v. Evans*, 43 Miss. 570; *Davidson v. Allen*, 36 Id. 419. Lien personal and not assignable: *Briggs v. Hill*, 6 How. 362; *Lindsey v. Bates*, 42 Miss. 396; *Walker v. Williams*, 1 Geo. 165; *Harvey v. Kelly*, 41 Miss. 490; *Skaggs v. Nelson*, 3 Cush. 88; *Pitts v. Parker*, 44 Miss. 247. *Rutland v. Brister*, 53 Id. 683. Lien is destroyed by assignment of the purchase-money note: *Pitts v. Parker*, *supra*. But in case the vendor is compelled to take up the note the lien revives: *Lindsey v. Bates*, 42 Miss. 397; *Stratton v. Gold*, 40 Id. 778; see *Perkins v. Gibson*, 51 Id. 699; *Cotton v. McGehee*, 54 Id. 510. The vendor's lien is not lost by assignment, where title bond only is given. The effect of the title bond, so far as it effects the securing of the purchase-money, is a conveyance of the title and the taking of a mortgage: *Tanner v. Hicks*, 4 S. & M. 294; citing *Dollahite v. Orne*, 2 Id. 590; *Parker v. Kelly*, 10 Id. 184; *Wilkins v. Humphrey*, 1 Cush. 311; *Robinson v. Harbourn*, 42 Miss. 795; *Pitts v. Parker*,

44 Id. 247; *Moore v. Lackey*, 53 Id. 85; *Mhoon v. Wilkerson*, 47 Id. 633.

Alabama: Lien recognised: *Gordon v. Bell*, 50 Ala. 213; *Wood v. Sullens*, 44 Id. 686. The transfer of the debt carries the lien: *Simpson v. McAllister*, 56 Ala. 228; *Wells v. Morrow*, 38 Id. 125; *White v. Stover*, 10 Id. 441; *Grigsby v. Hair*, 25 Id. 327; *Roper v. McCook*, 7 Id. 319; *Plowman v. Riddle*, 14 Id. 169. But if the purchase-money note be assigned "without recourse," or in any other manner which cuts off the vendor's liability, the lien is held not to pass: *Hall v. Click*, 5 Ala. 363; *Grigsby v. Hair*, 25 Id. 327; *Bankhead v. Owen*, 60 Id. 457; *Barnett v. Riser's, Ex.* 63 Id. 347; *Walker v. Carroll*, 65 Id. 61. Where the lien passes by assignment and the note is returned to the vendor unpaid, he may enforce the lien: *White v. Stover*, 10 Ala. 441; *Roper v. McCook*, 7 Id. 318; *Hall's Exr's. v. Click*, 5 Id. 363; *Kelly v. Payne*, 18 Id. 373.

Indiana: Lien recognised in *Diebler v. Barnwick*, 4 Blackf. 339; *Yargan v. Shriver*, 26 Ind. 364. A transfer of the debt carries the lien: *Nichols v. Glover*, 41 Ind. 24; *Johns v. Sewell*, 33 Id. 1; *Wiseman v. Hutchinson*, 21 Id. 40; *Kern v. Hazlerigg*, 11 Id. 443.

Kentucky: Lien recognised in *Thornton v. Knox*, 6 B. Mon. 74; *Tierman v. Thurman*, 14 Id. 277. May be assigned: *Broadwell v. King*, 3 B. Mon. 449; *Honore's Exr's v. Bakewell*, 6 Id. 67; *Ripperdon v. Cozine*, 8 Id. 465; *Embark v. Puston*, Id. 286; *Edwards v. Bahannon*, 3 Dana 98; *Johnston v. Gwathmey*, 4 Little 317; *Kinny v. Collins*, Id. 289; *Thoms v. Wyatt*, 5 Moore 132.

Texas: Lien recognised in *Briscoe v. Bronaugh*, 1 Tex. 326; *Yarborough v. Wood*, 42 Id. 91. Held assignable in *Debruhl v. Maas*, 54 Tex. 464; *White v. Downs*, 40 Id. 225; *Watt v. White*, 30 Id. 421.

Lien recognised in Michigan: *Carroll*

Rensselaer, Harr. 225; *Payne v.*
21 Mich. 524. New Jersey: In
Dora v. Todd, 2 Green 397; *Cor-*
Howland, 26 N. J. 311. Wis-
: In *Tiebey v. McAlister*, 9 Wis.
Willard v. Reas, 26 Id. 540.
do: In *Francis v. Wells*, 2 Col.
Florida: In *Bradford v. Martin*,
463. District of Columbia: In
v. Smith, 1 McArthur 592. Ore-
In *Pease v. Kelly*, 3 Oreg.

endor's lien denied and repudiated
as: *Simpson v. Mundee*, 3 Kans.
Smith v. Rowland, 13 Id. 246.
Carolina: *Wragg v. Compt. Gen.*,
saus. 509. North Carolina: *Wom-*
Battle, 3 Ired. Eq. 182; *Cameron*
son, 7 Id. 180. Maine: *Gilman*
own, 1 Mason 192; *Philbrook v.*
o, 29 Me. 410. Massachusetts:
t v. Dane, 5 Met. 485; *Ahrens v.*

Odiorne, 118 Mass. 261. Pennsylvania:
Kauffelt v. Bower, 7 S. & R. 64; *Zent-*
myer v. Mit tower, 5 Penn. St. 403; *Ste-*
phens's Appeal, 38 Id. 9.

Left in doubt in Connecticut: *Atwood*
v. Vincent, 17 Conn. 575; *Watson v.*
Wells, 5 Id. 468; *Chapman v. Beardsley*,
31 Id. 115. New Hampshire: *Arlien v.*
Brown, 44 N. H. 102. Rhode Island:
Perry v. Grant, 10 R. I. 334. In Ver-
mont Virginia and West Virginia, up-
held by judicial decisions, but now
abolished by statute. In West Virginia
and Virginia it may be reserved on the
face of the deed. See Vermont Statutes
of 1851, Ch. 47; *Manly v. Slason*, 21
Vt. 271. Virginia: Code 1873, Ch.
115, sec. 1; *Wade v. Greenwood*, 2 Robt.
475. West Virginia: Code 1870, Ch.
78, sec. 1.

CHARLES BURKE ELLIOTT.

Minneapolis, Minn.

Supreme Court of Illinois.

KELLEY v. PEOPLE.

act providing increased penalties for second and subsequent offences of burglary,
larceny, horse-stealing, robbery, forgery, or counterfeiting, is not unconstitu-
either as visiting penalties disproportioned to the offences, or as placing the
dant in jeopardy a second time for the same offence.

ere such act provides that, whenever any person having been convicted of either
eral enumerated crimes shall thereafter be convicted of *any one of such crimes*,
ll be liable to such increased penalty it does not require that the second of-
dealt with therein shall be a second instance of the identical crime for which
ender was first convicted. Therefore, a conviction of burglary, accompanied
of of a former conviction of robbery, constitutes a case of second offence.

fact that the former conviction, which is proved in order to constitute a second
e, was erroneous, will not prevent the operation of the statute, if such error did
prive the court of jurisdiction.

ceeding that a trial by the court of a criminal case, the defendant having waived
, is erroneous, yet such an error will not make the conviction void; and such
viction of one of the offences enumerated in the above-cited act will render a
quent conviction of any of those offences a second conviction within the meaning
act.

e fact that the constitution of the state has been disregarded in the course of
al proceedings will not render the judgment in which such proceedings terminate

void, if the error was not upon a jurisdictional point; nor can such judgment be collaterally impeached. The trial by the court of a man upon a criminal charge, he having waived a jury, while an error, is not a jurisdictional error.

ERROR to Criminal Court, Cook county.

J. M. Longnecker, for plaintiff in error.

J. S. Grinnell, Prosecuting Atty., and *Geo. Hunt*, Atty.-Gen., for the People.

The opinion of the court was delivered by

SHELDON, J.—Joseph Kelley, at the January term, 1884, was tried by a jury in the Criminal Court of Cook county for burglary; the indictment containing a count setting forth a former conviction, at the July term 1882, of said Kelley for robbery. He was found guilty of burglary, and the jury, under the instruction of the court, fixed his punishment at fourteen years' imprisonment in the penitentiary. The court sentenced him accordingly.

Several questions are raised with respect to the act respecting convictions upon second and third offences, approved June 23, 1883. Laws 1883, p. 76. That act, in its first section, is as follows: "That whenever any person, having been convicted of either of the crimes of burglary, grand larceny, horse-stealing, robbery, forgery or counterfeiting, shall thereafter be convicted of any one of such crimes committed after such first conviction, the punishment shall be imprisonment in the penitentiary for the full term provided by law for such crime at the time of such last conviction therefor; and, whenever any such person having been so convicted the second time, as above provided, shall be again convicted of any of said crimes committed after said second conviction, the punishment shall be imprisonment in the penitentiary for a period of not less than fifteen years; provided, that such former conviction or convictions and judgment or judgments shall be set forth in apt words in the indictment."

It is objected that the act is unconstitutional in that it violates the provision "that all penalties shall be proportional to the nature of the offence;" and it is because of a former conviction, for which the person charged has paid the penalty. Similar statutes have been adopted in many of the states, and they are upon the principle that it is just that an old offender should be punished more severely for a second offence; that repetition of the offence aggravates guilt:

ish. Crim. Law 959; 1 Whart. Crimes, § 13. It would be entirely competent for the legislature, in the absence of this act, to fix, as a punishment for the first commission of any one of the crimes named, the highest punishment that is authorized by the act, and it would not be for the court to say the penalty was not proportioned to the nature of the offence.

It is urged that under this act it is putting the accused in jeopardy twice for the same offence, in violation of sect. 10, art. 2, of the constitution. There is no trial twice for the same offence, but twice for two crimes committed at different times. The constitutional objections are without force.

It is next insisted, that under this act, the second conviction must be for the same crime the former conviction was for. We do not so read the statute. The language is most plain: that, whenever any person, having been convicted of either of the several enumerated crimes, shall thereafter be convicted of *any one* of such crimes, etc. It seems quite clear that the second conviction is not for a *particular* one of the crimes—the one for which the former conviction was had—but of any one of the crimes named. A record introduced to show a former conviction for robbery shows that the accused was indicted for robbery at the July term court, 1882, and that he pleaded not guilty; that he waived the intervention of a jury, and was tried by the court without a jury, found guilty by the court in manner and form as charged in the indictment—that is to say, of robbery—and was sentenced to the penitentiary for one year.

It is insisted that this did not show a legal conviction of robbery: that the accused in a criminal case of felony cannot waive a trial by jury and be tried, by consent, by the court, and upon a finding of guilty on such a trial be legally sentenced thereon. Conceding that to be so, and that a judgment upon such a finding would be regular and erroneous, it does not follow that such conviction was an absolute nullity—and not to be taken here as a former conviction. There is a distinction between “void” and “erroneous;” and the general rule is undoubted, that where the court has jurisdiction of the subject-matter and of the person, its judgment in the case will not be void, although it may be erroneous, and in a collateral proceeding the validity of the judgment cannot be called in question.

It is the application of the rule to the precise kind of case which

is here presented, what of authority we have met with is not entirely harmonious. Thus in *Windsor v. McVeigh*, 93 U. S. 274, in the opinion by a divided court, by way of illustration of the argument that a judgment may be void notwithstanding general jurisdiction of the subject, in citation of instances it is said: "So a departure from established rules of procedure will often render the judgment void; thus the sentence of a person charged with felony, upon conviction by the court without the intervention of a jury, would be invalid for any purpose;" no authority being cited. In *Com. v. Dailey*, 12 Cush. 84, in substance a verdict of guilty rendered in a case of misdemeanor, where the defendant had consented to a trial by eleven jurors, which is as much a ground of exception, it was said: "As it did not affect the jurisdiction of the court, the exception was one that the accused might waive." So in the recent case of *Lowery v. Howard* (decided by the Supreme Court of Indiana), 3 N.E. Rep. 124, where, upon a plea of guilty to an indictment for murder, the court fixed the punishment at imprisonment in the state's prison for life, and so sentenced the prisoner, when, under the law, a jury should have assessed the punishment to suffer the penalty of death, or be imprisoned in the state's prison for life, it was held that the judgment of the court was erroneous, but not void. And in *Ex parte Bond*, 9 S. C. 80, where a prisoner was convicted of an assault with intent to kill, and sentenced to confinement in the penitentiary, when the offence was not punishable by confinement in the penitentiary, it was held that the sentence was not void, but only erroneous. In *Ex parte Watkins*, 3 Pet. 193, Chief Justice MARSHALL said: "An imprisonment under a judgment cannot be unlawful unless that judgment be an absolute nullity, and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous."

In *Windsor v. McVeigh*, *supra*, it was said the general doctrine upon this subject is only correct when the court proceeded after acquiring jurisdiction of the cause according to the established mode governing the class to which the case belongs, and did not transcend, in the extent or character of its judgment, the law which is applicable to it. It was further said, that the more correct statement of the doctrine was in *Cornett v. Williams*, 20 Wall. 250: that "the jurisdiction having attached in the case, everything done *within the power of that jurisdiction*, when collaterally questioned, is held conclusive of the right of the parties unless impeached by

" The power to hear and determine a cause is jurisdiction. *coram judice* whenever a cause is presented which brings this into action: *U. S. v. Arredondo*, 6 Pet. 709; *Bush v. Han-* 70 Ill. 482.

the case here (of the former conviction) there was unbounded jurisdiction both of the subject-matter and person. The court had to proceed to hear and determine. The judgment was not an error as the court had no power, under any circumstances, upon any state of facts, to pronounce in such a case; but it was within the power of the jurisdiction which had attached. *People v. Liscomb*, 60 N. Y. 570. If there had been a finding of guilt, and a punishment by a jury, or if there had been a plea of guilty by the prisoner, in either such case the judgment would have been right. If the judgment be wrong, it is because it was based upon the court's finding the guilt and fixing the punishment; so that the correctness of the judgment depended upon the particular state of facts which was presented in the progress of the hearing and determination of a case of which the court had jurisdiction. The error was one in the exercise of jurisdiction, and not from a want of jurisdiction.

The only suggestion of ground there can be for holding the judgment void, and not erroneous merely, is that there was a departure from the established mode of procedure. To admit such ground of error, and to say that a judgment void, would, as it seems to us, in a great measure break down and make uncertain the well-established distinction between a judgment void for want of jurisdiction, and a judgment erroneous merely in the exercise of jurisdiction.

Cooley's Const. Lim. (5th ed.) 504, 505, it is laid down: "It is a general rule that irregularities in the course of judicial proceedings do not render them void. An irregularity may be defined as a departure from the established mode of procedure which conforms with the practice of the court, ought to have been observed in the proceedings." And on page 507: "In any case, we suppose a failure to return a jury on proper demand would be an irregularity merely rendering the proceedings liable to reversal, but not making them void."

We are of opinion the former conviction here should be adjudged erroneous, and not to be an absolute nullity; especially so, under the circumstances of this case, where the

defendant accepted the sentence of the court and suffered it to be carried into execution by undergoing the punishment. The court had fixed the minimum punishment for robbery—one year in the penitentiary; the maximum being fourteen years. The defendant may have deemed it for his interest to abide by the sentence of the court rather than to have it set aside, and he be exposed to the peril of having a greater punishment affixed by a jury. The judgment having been acquiesced in, and full execution had of it, we do not see how it can be looked upon as a nullity. It must be held to be, for the defendant, an acquittance from the crime. Upon another indictment for the same offence, he might plead the former conviction in bar; and if, in favor of the prisoner, the former conviction would not be held a nullity, neither, as against him, should it be so held.

Perceiving no error in the record, the judgment will be affirmed.

The rule laid down in the principal case respecting waiver of trial by jury in a case of felony is of such importance as to deserve more than a passing notice. We have always supposed that the jury constituted an integral part of the tribunal established by the constitution for the trial of persons indicted for felony. With respect to this question Judge COOLEY says, in his work upon Constitutional Limitations: "A petit, petty, or traverse jury is a body of twelve men, who are sworn to try the facts of a case as they are presented in the evidence placed before them. Any less than this number of twelve would not be a common-law jury, and not such a jury as the constitution guarantees to accused parties when a less number is not allowed in express terms; and the necessity of a full panel could not be waived—at least in case of felony—even by consent." Cooley's Const. Lim. *319; *Work v. State*, 2 Ohio St. 296; *Cancemi v. People*, 18 N. Y. 128; *Brown v. State*, 8 Blatchf. 561; *Hill v. People*, 16 Mich. 351; *State v. Mansfield*, 41 Mo. 470; *Brown v. State*, 16 Ind. 496; *Opinions of Judges*, 41 N. H. 550; *Vaughn v. Scade*, 30 Mo. 600; *Kleinschmidt v. Dunphy*, 1 Montana 118; *Allen v. State*,

54 Ind. 461; *State v. Lockwood*, 43 Wis. 403; *State v. Davis*, 66 Mo. 684; *Williams v. State*, 12 Ohio St. 622; *Swart v. Kimball*, 43 Mich. 443; *Bell v. State*, 44 Ala. 393; *State v. Carman*, 63 Iowa 130; *State v. Langan*, 23 N. W. Rep. 907. See *contra*, *State v. Kaufman*, 51 Iowa 578.

We have examined all the cases above cited; and while in none of them does the question of the validity of the sentence upon a trial by the court, or by the courts with less than a common-law jury, come in question in a collateral proceeding, in the most of them it seems taken for granted that such a sentence is a nullity. The words "nullity," "null and void," are frequently used by the courts and writers to express the effect of such a sentence. We are aware of but one case, and that a *nisi prius* one, where the precise question has arisen; and that arose upon *habeas corpus* before the Hon. WILLIAM W. McALLISTER, of the Appellate Court for this district; who held that the sentence of a prisoner tried by the court without a jury, upon an indictment for a felony, trial by jury having been waived by the defendant, was a nullity; and who upon the trial court's declining to again take cognisance of the case and retry the

er, ordered his discharge. The opinion of this learned jurist, though not overruled by a court of last resort, is justly entitled to great weight. It was his opinion in this case that the jury was an essential part of the court, and that it was incompetent for the parties by consent to change the constitution of the court. See *People v. Hanchett*, 15 Chic. Leg. News (but see *People v. Lyons*, reported in book and page.)

It also, appears to be the opinion of Justice COOLEY, whose opinion upon this subject is also entitled to great respect.

We do not regard the quotation by the Court in the principal case as overruling *Cooley's Const. Lim.*, that in any case the failure to award a jury on proper grounds would be an irregularity merely vitiating the proceedings liable to reversal, but not making them void, and which he cites no authority, as excepting his opinion upon the precise question in question; for in another place he is considering the subject of the necessity of a jury in cases of felony he says: "The infirmity in case of a trial by jury of less than twelve, by consent, is not that the tribunal would be one contrary to the law, created by the mere voluntary act of the parties; and it would in effect be an attempt to submit the question of arbitration the question whether the accused has been guilty of an offence against the state:" *Cooley's Const. Lim.* *319.

In granting the premise of the court in the principal case that the trial of a case of felony by the court without a jury is only "a departure from the established mode of procedure," we can agree with the conclusions that it is error only; but it seems to us that it is more than a mere departure from the established mode of procedure. As the court say in *Windham v. McVeigh*, 93 U. S. 282, "the doctrine invoked by counsel that where a court has once acquired jurisdiction, it has a right to decide every question which arises in the case, and its judg-

ment, however erroneous, cannot be collaterally assailed, is undoubtedly correct as a general proposition; but like all general propositions is subject to many qualifications in its application. All courts, even the highest, are more or less limited in their jurisdiction; they are limited to particular classes of actions, such as civil or criminal; or to particular modes of administering relief, such as legal or equitable; or to transactions of a special character, such as arise in navigable rivers, or relate to testamentary disposition of real estate; or to the case of particular process in the enforcement of the judgments. *Norton v. Meador*, Circuit Court for California. Though the court may possess jurisdiction of a cause, of the subject-matter and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and the parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. * * * The judgments mentioned, given in the cases supposed, would not be merely erroneous, they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases. * * * So a departure from established modes of procedure will often make the judgment void; thus, the sentence of a person charged with felony upon conviction by the court without the intervention of a jury, would be invalid for any purpose. The decree of a court of equity upon oral allegations without written pleadings, would be an idle act, of no

force beyond that of an advisory proceeding of the chancellor; and the reason is, that the courts are not authorized to exert their power in that way. The doctrine stated by counsel is only correct when the court proceeds after acquiring jurisdiction of the cause, according to the established mode governing the class to which the case belongs, and does not transcend in the extent or character of its judgment, the law applicable to it." In this case it was accordingly held that a sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard, his appearance upon citation having been stricken out and his right to appear denied by the court, was not a judicial determination of his rights and not entitled to respect in any other tribunal, notwithstanding the fact that up to the time of striking out the defendant's appearance, the court had jurisdiction both of the person and the subject-matter.

Upon a careful consideration of the principal case, it seems to us that it would have been equally within the power of the court to have delegated the trial of the issue of fact to the clerk of the court, the sheriff, to arbitrators or any other voluntary tribunal, and that the sentence in the

principal case, equally with one pronounced upon a finding by such an irregular tribunal, is null and void. With all its faults as a tribunal for the administration of justice in criminal cases we are a believer in trial by jury. As an educator of the people, and as a means of protection against the exercise of arbitrary power, its equal does not exist under any other system of jurisprudence. To it we are largely indebted for the measure of liberty we enjoy to-day. Let the law regulating it be amended, but not repealed nor the beneficial results of the system abridged by any power short of an amendment of the constitution by the people. From a decision like that in the principal case it is but a step to hold that the *denial* of trial by jury in a criminal case is a mere error, a decision which in many cases would entirely deprive trial by jury of its chief good, its power to protect against centralized and arbitrary power. If the one is merely error, so is the other. To our mind the decision in the principal case is a dangerous precedent, and an unwarranted departure from sound constitutional principles.

M. D. EWELL.

Chicago.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹

SUPREME COURT OF ILLINOIS.²

SUPREME COURT OF NEW HAMPSHIRE.³

SUPREME COURT OF OHIO.⁴

SUPREME COURT OF SOUTH CAROLINA.⁵

ADVANCEMENT.

Death of Son after receiving Advancement.—The acceptance by a son of a conveyance of land from his father, in satisfaction of his share as pro-

¹ Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term, 1885. The cases will probably appear in 117 U. S. Rep.

² From Hon. N. L. Freeman, Reporter; to appear in 114 Ill. Rep.

³ From Hon. W. S. Ladd, Reporter; to appear in 61 N. H. Rep.

⁴ From George B. Okey, Esq., Reporter; to appear in 44 Ohio St. Rep.

⁵ From Robert W. Shand, Esq., Reporter; to appear in 23 S. C. Rep.

heir in the father's estate, will not only bar his own right to the distribution of his father's estate, real and personal, but also his children, in case he should die before his father: *Simpson*, 114 Ill.

ARBITRATION.

Attempt to influence Arbitrator—Setting aside Award.—It is sufficient to authorize a court of equity to enjoin a suit at law upon an award, and to set aside the award, that one of the parties in interest made a statement to one of the arbitrators, in the absence of the adverse party, designed to produce a tendency to improperly affect his decision as an arbitrator, and showing that such statement, in fact, produced any harmful result to such other party: *Catlett v. Dougherty*, 114 Ill.

It is also error to allow an arbitration who by overt acts attempts to corrupt or improperly influence the arbitrators, or any one of them, to make an award in his favor, will not be heard to say that he was impotent to accomplish what he sought, and to raise an issue thereupon: *Id.*

ATTACHMENT.

Purchaser for Value—Lis Pendens.—A general attachment of all a debtor's interest in real estate, in a town, does not hold land fraudulently conveyed by the debtor by a deed recorded before the attachment, and conveyed by his fraudulent grantee after the attachment to an innocent purchaser for value: *Ashland Savings Bank v. Mead*, 61 N. H.
As against the latter and subsequent purchasers from him, such attachment does not constitute constructive notice of a lien, or of *lis pendens*: *Id.*

BANK. See *Bills and Notes*.

BANKRUPTCY.

Finality of Judgment obtained after Discharge in Suit commenced before Filing of Petition.—Where suit was commenced in a state court before the filing by defendant of his petition in bankruptcy, on a debt due, but not proved thereunder, and judgment was obtained thereon subsequent to the granting of a discharge to said bankrupt, *held*, in a subsequent suit, that said judgment in another state that the discharge could not be pleaded as a bar thereto: *Dimock Revere Copper Co., S. C. U. S.*, Oct. 1885.

BILLS AND NOTES.

Bill of Lading—Transfer of Title—Drafts accompanying Bill—National Bank.—A draft for a sum stated, drawn by the seller against a bill of lading in favor of a national bank, by whom it is discounted or purchased, and the bill of lading attached, passes title to the goods therein mentioned to the bank; and the bank may recover them, upon dishonor of the draft from a sheriff who had seized the goods as the property of the seller under attachment subsequent to the purchase by the bank: *Union Bank v. Rowan*, 23 S. C.

A draft so drawn is a bill of exchange, and its purchase by a national bank is not beyond the powers conferred by acts of Congress upon national banks: *Id.*

CORPORATION.

Dissolution—Reversion of Property—Seal.—Upon the dissolution of

a corporation (other than a moneyed, trading, or municipal corporation) by expiration of charter, all of its property not validly alienated before dissolution reverts to the grantor: *St. Phillip's Church v. Zion Presbyterian Church*, 23 S. C.

Where a corporation, having no adopted seal, directed a conveyance to be made of a lot of land, and a deed was accordingly executed professing to be under the seal of the corporation, attested by the signature of its president, and was signed by such president, and a wafer was attached, which was intended to be the seal of the corporation., *held*, that the wafer was the corporate seal to this deed: *Id.*

CUSTOMS DUTIES.

Proprietary Medicine, what is.—Sect. 2504, Schedule M, p. 480 (2d ed.) Rev. Stat., imposes a tax of 50 per cent. *ad valorem* on proprietary medicines, and the same schedule and section, p. 477, makes the duty on calcined magnesia twelve cents per pound. A certain firm put up calcined magnesia in bottles, with their name blown thereon, wrapped up in a circular which claimed peculiar excellence for their preparation, cautioning purchasers against spurious imitations thereof, and calling attention to their "trade mark" stamped thereon. The process of calcining magnesia used by said firm was not a secret or peculiar one, but the preparation sold by it did differ from ordinary calcined magnesia (though used for the same purpose) in that the carbonic acid was eliminated and the grit got rid of; and it had a peculiar reputation and value in the market by reason of the nicety with which it was prepared. *Held*, that it was subject to tax as a proprietary medicine: *Ferguson v. Arthur*, S. C. U. S., Oct. Term 1885.

DAMAGES.

Diversion of Water—Proof of Loss of Profits—Evidence.—In an action of a lessee of a mill against his lessor for a diversion of water, depriving the plaintiff of the demised water-power, damages for loss of profits being claimed in the declaration, and loss of profits being a damage the parties could have reasonably anticipated, proof of the profits done at the mill is admissible on the question of damages: *Crawford v. Parsons*, 61 N. H.

DECEDENTS' ESTATES. See *Advancement*.

ERRORS AND APPEALS.

Determination of Value of Matter in Dispute.—In a suit to collect interest due on certain bonds of a railroad by the foreclosure of a mortgage made to trustees to secure a series of bonds aggregating \$500,000, the bill was dismissed. The suit was brought by two complainants for themselves and all others in the like situation who might join with them, but no one saw fit to join. The principal of complainants' bonds exceeded \$5000, but the interest, which the suit was brought to recover, was less. *Held*, that the matter in dispute was less than the jurisdictional limit of the United States Supreme Court; *Bruce v. Manchester & Keene Rd.*, S. C. U. S., Oct. Term 1885.

EVIDENCE. See *Will*.

Judicial Notice—Distance from Seat of Government.—A statute of

Montana provided that "all acts of the legislature declaring that they should take effect from and after their passage, shall so take effect only in the seat of government, and in other portions of the territory, allowing fifteen miles from the seat of government for each day." *Held*, that where, by reason of this statute, the question whether a certain law was in effect at a certain time in a certain part of said territory, depended upon the distance of that place from the seat of government; the distance was a fact of which the court was bound to take judicial notice: *Myt v. Russell*, S. C. U. S., Oct. Term 1885.

FRAUD.

Deceit—Representations as to Remote Lands.—Where a party effects an exchange of real estate situate in another state, with a person residing in this state, for property here, by means of false representations as to the quantity of his land, the location thereof, and the character of the improvements thereon, with a knowledge of the falsity of his representations, he will be liable to the injured party in an action on the case for fraud and deceit. Under circumstances like these, the person with whom the exchange is sought may rely upon the statements as being true, without being guilty of such negligence as to preclude a recovery from him for the fraud practised on him. It might be different where the property is situated conveniently near, so as to permit an examination to be readily made: *Ladd v. Pigott*, 114 Ill.

HUSBAND AND WIFE. See *Presumption*.

Divorce—Alimony, defence to.—A judgment ordered for the defendant upon an agreed statement of facts, which showed that the mortgage suit was given to secure the payment of a sum of money by a husband to his wife, under a collusive agreement for obtaining a divorce in her favor, is not conclusive against the rights of the wife, after such divorce has been decreed, to recover alimony from the husband: *Cross v. Cross*, 61 N. H.

Nor is the adultery of the wife, both before and after such divorce, a legal bar to the granting of alimony upon her petition subsequently brought: *Id.*

INFANT.

Decree of Court—Conclusiveness.—A decree of the judge of probate settling the settlement of an administration account concludes an infant whose guardian has notice and is present: *Simmons v. Goodell*, 61 N. H.

If an appeal is not taken, a decree has the same effect as the judgment of a court of common law: *Id.*

Errors in the decree can be corrected only upon appeal; errors in the record of the decree may be corrected at any time: *Id.*

INSURANCE.

Life Insurance—Failure to send Notice—Waiver of Tender of Premium.—Where, by the terms of a contract of life insurance, the beneficiary named in the policy is entitled to participate in the profits, a portion of which, in the form of dividends, is to be applied each year in reduction of premiums, and it has been the uniform practice of the company to give timely notice of the amount of premium, amount of divi-

dends, and of the balance to be paid in cash, and the company neglects to give such notice, having knowledge of the residence of the beneficiary, and by reason thereof a premium is not paid at the time specified in the policy, the company cannot set up such failure to pay as a defence to a recovery upon the policy, although by its terms the same is to be forfeited in case of failure to pay a premium upon any of the dates stipulated therein: *Manhattan Life Ins. Co. v. Smith*, 44 Ohio St.

In such case, where the company has uniformly sent the notices to the insured (the husband of the beneficiary) and he has made payment of premiums from year to year, the law will treat him, in making such payments, as agent for the wife, but where it is shown to the company, by letters from the husband, very shortly after notice sent, that he and the wife have separated, she having commenced a proceeding for alimony against him, and that he is desirous of having the policy changed and made payable to his estate, the company is not justified in treating him as her agent, for the purpose either of receiving notice for her, or of making a surrender of the policy: *Id.*

Where, in such case, the company repudiates the contract, and by its course of conduct, clearly indicates that a tender of the premium after the death of the insured, if made, would not be accepted, a failure to make such tender will not bar a recovery on the policy: *Id.*

Agents—Limitation of Powers of—Representations not contained in Written Application.—While the powers of an insurance agent are *prima facie* co-extensive with the business intrusted to his care, yet an insurance company, like any other principal, may limit the authority of its agents, and thus bind all parties dealing with them with knowledge of the limitation: *N. Y. Life Ins. Co. v. Fletcher*, S. C. U. S., Oct. Term 1885.

The application for a policy of insurance contained a provision, that no statements or representations made, or information given, to the persons soliciting or taking the application for the policy, should be binding on the company, or in any manner affect its rights, unless they were reduced to writing and presented at the home office in the application. *Held*, that such a stipulation is binding upon the parties: *Id.*

LIMITATIONS, STATUTE OF.

Joint Sureties—New Promise by one—Payment of Interest.—Where a principal and sureties gave their joint and several promissory note, upon which, after maturity, the principal debtor, from time to time, made several payments, the legal liability of all the parties to the note was discharged at the expiration of six years from its maturity, and thereafter action could be maintained only on the new promise implied from the partial payments credited on the note: *Walters v. Kraft*, 23 S. C.

But as such subsequent promise constituted a new contract and a new cause of action, no one is liable except him who made it; the liability of the sureties was not continued by the payments and promises of the principal debtor: *Id.*

The relation of agency does not exist between joint-debtors arising from community of interest; their community of interest is confined to the payment of the debt. Payment by a principal debtor cannot con-

MANDAMUS.

MASTER AND SERVANT.

MORTGAGE.

absolute Deed with Parol Defeasance—How Recorded.—A deed, in form, intended, however, to secure the payment of money from the maker to the grantee, and, upon the payment of which by a certain time, the grantee agreed to reconvey the property to the grantor, which in equity a mortgage, is not a legal one; and, to make it available against creditors of the grantor, it need not be recorded as a mortgage.

mortgage ; it is sufficient for such purpose, if it be recorded within the time prescribed for the registration of all other deeds and instruments of writing for the conveyance or incumbrance of lands in this state: *Kemper v. Campbell*, 44 Ohio St.

Notes secured by—Endorsement of—Payment of one Note by Endorser—Priority as between Assignee of Endorser and Holder of other Notes.—K. executed and delivered to T. three notes, payable to T.'s order, due in one, two and three years from date, and a mortgage to secure their payment. Before either note became due, T. endorsed the notes, waiving demand and notice, and delivered both to A., with an assignment of the mortgage. The note maturing in one year not being paid when due, was put in judgment against K. as maker and T. as endorser. K. being insolvent, T. paid the judgment. He then commenced suit to foreclose the mortgage, claiming the benefit of the mortgage security and a lien prior to the lien of A., who held the remaining two notes, which were then past due. A., by answer and cross-petition, alleged facts showing T.'s liability as endorser upon the two notes, that K. was insolvent, that the lands would prove insufficient to satisfy the whole mortgage debt, claiming priority of lien, praying foreclosure and full relief. Later, S., on his motion, became plaintiff, and filed supplemental petition averring purchase from T., and assignment of all his rights and interest in the mortgage and as plaintiff in the suit, and claiming priority of lien. The land was sold. The sum realized was not sufficient to satisfy the whole indebtedness. *Held*, that A. was entitled to payment in full from the proceeds before application of the money to the claim of S.: *Anderson v. Sharp*, 44 Ohio St.

Omission of word Heirs—Intention.—By a well-established general rule the use of the word "heirs" or other appropriate words of perpetuity in a mortgage or other deed of conveyance of lands, is essential to pass a fee simple estate ; but this is not an inflexible rule admitting of no exception or qualification: *Brown v. First Nat. Bank of Hamilton*, 44 Ohio St.

Where the language employed in, and the recitals and conditions of, a mortgage plainly evidence an intention to pass the entire estate of the mortgagor as security for the mortgage debt, and the express provisions of the instrument cannot otherwise be carried into effect, it will be construed to pass such estate, although the word "heirs" or other formal word of perpetuity is not employed: *Id.*

MUNICIPAL CORPORATION.

Increase of Indebtedness beyond Constitutional Limit—Defence to proceeding to improve Street.—The fact that a city has already exhausted its constitutional power to incur a debt, can not be shown to defeat a proceeding by it to improve a street by special assessment in part, and partly by general taxation. That question can not arise until the city seeks to borrow money or incur an indebtedness in that regard: *Jacksonville Ry. Co. v. City of Jacksonville*, 114 Ill.

Bonds of—When Excess of Issue Invalid.—A county court was authorized to issue bonds for a subscription to such an amount of the stock of a railroad as should be proposed by certain commissioners and

proved by a majority of the voters of the county. *Held*, that bonds issued in excess of this amount were void, and that the certificate of the judge of the county court upon the back of each bond that it was issued authorized by the statute, and by an order of the county court in pursuance thereof, cannot estop the county to deny that the particular bond is void, because the county court, at the time of its issue, had exhausted the power conferred by the act of the legislature and the vote of the people; nor can the payment of interest on all the bonds ratify bonds issued beyond the lawful limit, as the county cannot ratify what could not have authorized: *County of Davies v. Dickinson*, S. C. U. Oct. Term 1885.

NEGLIGENCE. See *Master and Servant*.

Railroad—Trespasser.—While a railroad company cannot be said to owe no duty to one who unlawfully intrudes himself upon its engines or cars, it does not owe to him the same duty that it owes to a passenger, even to one of its employees: *Darwin v. Charlotte, Col. & Aug. Rd. Co.*, 23 S. C.

Where a trespasser gets, without authority, upon the most dangerous place on a railroad engine and is killed, he is guilty of contributory negligence, and no recovery of damages for his death can be obtained against the company, even if the company had been guilty of negligence, and although the engineer knew the person was in such place of danger and did not warn him off. In the case of a passenger, the rule would be different: *Id.*

PARTNERSHIP.

Contract with one Member of Firm for Interest in Profits—Dissolution—Notice by Mail.—A person may contract with a particular member of a firm for an interest in his share of the profits, without making himself a member of such firm and liable for its debts: *Meyer v. Krohn*, 4 Ill.

Proof of the mailing of notices of the dissolution of a partnership and the retirement of certain members thereof, properly addressed to persons having had prior dealings with the firm, is *prima facie* evidence that the notices have been received by the parties to whom they were addressed; but such presumption may be rebutted by proof that they were not received: *Id.*

PATENT.

Infringement—Measure of Damages.—Plaintiff was patentee of a combination lock, the essential feature of which was the turning-bolt. He granted no licenses, but manufactured the locks himself, being fully able to supply the demand. Defendant, infringing on plaintiff's patent, sold a lock having the turning-bolt device, at a reduced price, forcing the latter to do the same in order to hold his trade. *Held*, that defendant's infringement must be considered to have caused the entire loss of the plaintiff by a reduction of prices, after allowing a proper sum for any other patented device contained in the defendant's locks and for any other causes which gave to the defendant an advantage in selling his locks: *Yale Lock Co. v. Sargent*, S. C. U. S., Oct. Term 1885.

PLEADING.

Joinder of Covenant and Case.—Counts in covenant and case may be joined in a declaration on a single cause of action : *Crawford v. Parsons*, 61 N. H.

POWER.

Trust—Exercise of Power by Donee for his own Benefit.—Where a testator invests his widow with a life estate in his property, with power to dispose of the remainder to his heirs, an attempted appointment of it in such manner as to secure to herself a substantial pecuniary benefit from its disposition, not authorized by the testator, is an abuse of such power of appointment and is void : *Shank v. Dewitt*, 44 Ohio St.

An innocent motive or an honest misconstruction of the power conferred will not save the exercise of the power, if the true purpose of it is violated : *Id.*

RAILROAD. See *Negligence*.

PRESUMPTION. See *Surety* ; *Partnership*.

Conflicting Presumptions—Validity of Marriage.—Where a marriage in fact is shown, the law raises a strong presumption in favor of its legality, and the burden of proof is on the party contesting its validity to show that it is not valid : *Johnson v. Johnson*, 114 Ill.

So, although the presumption in favor of the validity of a marriage in fact, and of the innocence of the contracting parties, may conflict with that of the continued life of a former husband or wife not heard from for a period less than seven years prior to the second marriage, yet if neither presumption is aided by proof of facts or circumstances co-operating with it, the presumption of the validity of the second marriage must prevail over the other : *Id.*

SURETY. See *Limitations, Statute of*.

Extension of Time for Principal—Presumption of Payment.—Where a creditor receives from the principal debtor payment of interest in advance on a past due note, an agreement to give time is necessarily implied, and the creditor thereby debars himself of suing meantime on the note, and the surety is therefore discharged—unless the creditor can show mistake, or, possibly an agreement that the right of suit should not be suspended : *Gardner v. Gardner*, 23 S. C.

The question whether a sealed note which matured in 1860, and was credited with payments by the principal debtor down to 1865, should be presumed paid as to the sureties in 1884, raised but not considered : *Id.*

TAXATION.

Exemption from, a Franchise—Loss by Non-User.—Exemption from taxation, being a special privilege granted by the government to an individual, either in gross or as appurtenant to his freehold, is a franchise ; and a presumption of the surrender of this franchise may arise from long acquiescence in actual taxation, which the government may take advantage of, though the same period of non-user would be a ground of forfeiture in a direct proceeding on the part of the state to revoke the franchise : *State of New Jersey v. Wright*, S. C. U. S. Oct. Term 1885.

TRUST.

Resulting Trust—Expenditure of Money in Improving Land.—An interest in land does not pass, by resulting trust, from the owner to one to whom money is expended in improving the land: *Bodwell v. Nutter*, 114 Ill.

Religious Use—Transfer to Persons of different Denominations.—Where land was conveyed to be held in trust for the erection of a church and academy for the benefit of a Lutheran congregation, the church council could not transfer to others who were not Lutherans, or to the town council, any portion of the land for the establishment of an academy or school: *Busbee v. Mitchell*, 23 S. C.

Resulting Trust—When it Arises—Laches.—Where a party receives money of another, to be invested in the purchase of land, and pays out the same, with other money of his own, in a purchase, taking a deed in his own name, he will hold the land so acquired in trust for the person to whom the money he has so used, in the proportion it bears to the entire consideration paid: *Springer v. Springer*, 114 Ill.

A party who takes a conveyance of land in his own name, partly paid with the money of another placed in his hands, can not set up as a defence to a bill to enforce a resulting trust, the laches or delay of the complainant for the time he has admitted and recognised his equitable claim. Such defence will avail him only from the time he sets up an independent claim, and denies the complainant's rights: *Id.*

Resulting Trust—Evidence after great lapse of Time.—The evidence to establish a resulting trust after the lapse of fifteen or sixteen years, especially after many of the principal witnesses having knowledge of the facts are dead, should be of the most satisfactory kind. If the evidence fails to satisfy the court that the money paid for the land was for the use of the party seeking to establish the trust, no resulting trust can be declared: *Heneke v. Floring*, 114 Ill.

Where a resulting trust is sought to be established after the lapse of many years, on the ground that complainant's money was used in payment of the same, and that complainant's wife, by conspiracy and fraud, procured the conveyance made to her imbecile son by a former marriage, it is incumbent on the plaintiff to establish these facts by very clear and satisfactory evidence, and failing to do so, he can have no relief: *Id.*

VENDOR AND VENDEE.

Purchase by Vendee of Superior Title.—The purchaser of land, while in possession under his contract of purchase, is under no obligation to defend his vendor's title, and the law does not forbid him from buying a superior title to the premises, and asserting it against his vendor: *Deitrich*, 114 Ill.

Where the purchaser entered into possession under an agreement that the purchase-money was not to be paid unless the vendor should, within three years, make him a warranty deed conveying a perfect title, in case of failure to make him such conveyance the purchaser was to remain in possession of the premises for the period of three years, and pay a reasonable rent for the time he could hold peaceable possession, before the expiration of the three years he acquired the title from

other parties, it was *held*, that there was nothing in the relation of the parties, under the original contract or otherwise, that prevented the purchaser from yielding to the superior title and purchasing the same, and in that way secure his peace: *Id.*

WILL. See *Mandamus*.

Remainder—Vesting—Conversion.—A. by his will gave \$10,000 to B. in trust for C., the income to be paid to C. for life, with remainder to the children of C., if she had any, and if she had none, then to D. C. had no children. D. died in the lifetime of C., leaving one child. *Held*, that the remainder became vested in D. immediately on the death of the testator, subject to be divested by the birth of a child to C., and that, on the death of C. without children, the fund passed to the heir-at-law of D.: *Vandewalker v. Rollins*, 61 N. H.

The quality of property for purposes of transmission by will or inheritance is not changed from the character in which the testator or intestate left it, unless there is some clear act or intention by which he has impressed upon it a definite character either as money or land. And when, for the security of the fund, money is converted into land by a judicial decree, the land is substituted for the fund and goes to the person who would have taken the fund had it remained specifically personal estate: *Id.*

Testamentary Capacity—Undue Influence—Proof of Will.—On the question of testamentary capacity, the will itself is evidence: *Whitman v. Morey*, 61 N. H.

On the question of undue influence, the proponent of the will may show that nominal legacies to heirs other than children were inserted at the suggestion of the person who wrote the will, because he erroneously supposed it necessary to the validity of the will: *Id.*

When portions of a deposition are read by one party for the purpose of contradicting the witness who gave it, the other party may read, from the same deposition, so much as pertains to the same subject, and tends to explain, qualify, or limit what is so read: *Id.*

The practice of requiring an executor, upon the issues of insanity and undue influence, to call all the subscribing witnesses to the will, if alive, sane, and within the jurisdiction, should not be departed from without good cause: *Id.*

Whether a party shall be allowed to put leading questions to his own witness is determined by the presiding justice while the examination of the witness is going on before him, and is not matter of exception: *Id.*

The common-law rule, forbidding a party to discredit his witness, has no application when the party, by legal intendment, has no choice, as in the case of an attesting witness: *Id.*

Upon the issues of insanity and undue influence, declarations of the testator, tending to show the state of his feelings toward relatives to whom he gave only a nominal sum, may be received: *Id.*

Revocation—Evidence.—The revocation of a will is not effected by the death of legatees or devisees named in it; nor by the marriage of the testator, there being no issue of the marriage; nor by the alienation of the larger portion of his estate, which was specifically disposed of by the will; nor by the acquisition of other estate to an amount much greater

can he possessed at the time the will was made; nor by the concurrence of all the above circumstances: *Hoitt v. Hoitt*, 61 N. H.

Declarations of a testator to the effect that he understood a will made by him was revoked, are not admissible on the question of revocation: *Id.*

Declarations of a testator as to his intention in the disposition of his property, are not competent evidence from which to ascertain his intention as expressed in the will: *Id.*

LIST OF NEW LAW BOOKS.

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THE COMPETENCY, AS WITNESSES, OF HUSBAND AND WIFE.

(Continued from page 365, ante.)

X. CASES OF AGENCY.

(1.) *In general*.—Perhaps the most important exception to the rule in question is that it will not be applied to cases where the wife has acted for the husband in his business, and by his authority and consent; he thereby adopts her acts and will be bound by any admission or acknowledgment made by her respecting that business, and her testimony will be admissible touching anything she did as agent, or within the scope of her delegated authority: *Wheeler v. Wilson Mfg. Co. v. Tinsley*, 75 Mo. 458; *Degenhaart v. Schmidt*, 7 Mo. App. 117; *Lunay v. Vantyne*, 40 Vt. 501; *Wells v. Dunn*, 16 Wis. 235; *Chundt v. Laizon*, 43 Id. 536. There are many cases asserting the admissibility of evidence of the admissions of the wife made out of court as to her agency and her acts done under it; but our purpose here is to ascertain her competency as a witness testifying on the trial respecting such acts, and the *factum* of her agency. See *Emerson v. Blondin*, 1 Esp. 142; *Str.* 527; *B. N. P.* 287; *Anderson v. Saunderson*, *Holt N. P.* 1; *White v. Cuyler*, 6 T. R. 176; *Clifford v. Burton*, 1 Bing. 9; *Tenner v. Lewis*, 10 Johns. (N. Y.) 38; *Riley v. Suydam*, *Barb.* (N. Y.) 222; *Williamson v. Morton*, 2 Md. Ch. 74; *Hughes v. Stokes*, 1 Hayw. (N. C.) 372; *Curtis v. Ingham*, 2 289.

(2.) *Wife competent.*—The English rule was narrower than the one just stated. The admissions and declarations of the wife were admitted, and so far she was treated like any other agent, but she could not be called as a witness, while an ordinary agent could be: 1 Phil. Ev. sect. 83.

This distinction does not seem to have met with favor in this country, except, perhaps, in Arkansas. A late case in that state holds that neither husband nor wife can testify for or against the other in civil cases; not even when one acts as agent for the other: *Watkins v. Turner*, 34 Ark. 663. Compare *Magness v. Walker*, 26 Id. 370. The American rule seems to be that a wife is not a competent witness for her husband, *except* as to matters in which she has acted as his agent. The question whether she so acted in a given transaction (though she is probably a competent witness upon that question) is to be determined by the court before she is admitted to testify in chief; and the proof of her agency should generally be elicited by direct interrogatories on that subject: *Chundt v. Laison*, 43 Wis. 536; *Burke v. Savage*, 13 Allen (Mass.) 408; where she was held a competent witness to prove her agency, as well as her acts as agent. In Illinois, she is placed on the footing of a *feme sole*, so far as respects her competency to testify concerning transactions in which she acted as her husband's agent: *Poppers v. Miller*, 14 Ill. App. 87. In Indiana, it is held that communications between husband and wife relating to an agency conferred by him upon her are not confidential communications nor inadmissible in evidence: *Schmied v. Frank*, 86 Ind. 250. But the contrary doctrine is maintained in Tennessee: *Washington v. Bedford*, 10 Lea 243. During her husband's absence from home the wife acts as his agent in the care and protection of his property within the home limits, without any express direction or agreement, and is competent to testify as to what she does in that behalf in any action by or against him: *Fisher v. Conway*, 21 Kan. 18; *Town v. Lampshire*, 37 Vt. 52. If she keeps his accounts for him, she may testify that she made the entries by his directions and in his presence: *Littlefield v. Rice*, 10 Metc. (Mass.) 287. Being authorized by him to take care of his property and to notify the insurers in case of loss, she may testify in an action on the policy as to facts connected with his loss, and the insurers cannot show by her that he did not hold the legal title to the land, such fact not being within the scope of her agency:

Connor v. Hartford Fire Ins. Co., 31 Wis. 161. Where he is d for property pledged with her for money loaned, she may ify as to what contract she made with the plaintiff, and that she ed as her husband's agent in making it: *Summer v. Cooke*, 51 a. 521. If her husband gives her a note to collect she may ve her acts within the scope of her agency, in her husband's against the estate of the deceased maker: *Engenann v. Immel*, Wis. 249. Where, through his acts of cruelty, she is compelled eave his house, she may testify *against* him, when sued for neces- es furnished to her, and prove such acts of cruelty; and, in such ase, it is immaterial whether his liability be placed on the und of her implied agency to contract for the necessities, or on that his marital duty: *Bach v. Parmely*, 35 Wis. 233.

(3.) *Wife incompetent*.—Ordinarily there must be proof of ority conferred, or ratification by the husband, or the wife will be a competent witness to establish that a contract entered into her with a third person is the contract of her husband made by as his agent: *Bliss v. Franklyn*, 13 Allen (Mass.) 244. In mont, it is held that where the husband is temporarily absent n home for a day, leaving his wife without any special charge agency, except "such as married women living and keeping se with their husbands would have in such cases," she is not agent so as to be competent to testify for him as to matters aspiring during his absence: *Bates v. Cilley*, 47 Vt. 1. With due respect, the writer submits that, as a general proposition, is not sound law. Again, where the husband is sued for the ce of goods purchased by him in the wife's presence, she assist- in their selection, she is not competent, on the ground of ncy, to prove that the goods were furnished on the credit of a d person in the payment of the latter's indebtedness to the hus- d: *Tripp v. Barker*, 78 Ill. 146. So, it is held, that merely ding the wife to collect payment for goods sold by the husband s not make her his agent within the rule: *Robertson v. Brost*, Ill. 116. And where a wife, being requested by her husband all into their house the indorser of a note held by the husband, ed the indorser "whether he was going to pay the note," she held not to be the husband's agent in such a sense as to be petent to testify to admissions made to her by the indorser ch would render him liable on the note without presentment and and of the maker: *Hale v. Danforth*, 40 Wis. 382.

(4.) *Husband as agent of wife.*—The same principle by the application of which the wife is permitted to testify as to her acts done as the agent of her husband, also admits the husband as a witness for his wife, as to acts done by him as her authorized agent: *Hobby v. Wisconsin Bank*, 17 Wis. 167; *Haule v. Kreihn*, 65 Mo. 202; *Chelsey v. Chelsey*, 54 Mo. 347. Thus, he may testify as to what disposition he has made of money belonging to her separate estate: *Robison v. Robison*, 44 Ala. 227. He may show what he did in her absence as well as what he did in her presence: *Mark v. Steinfert*, 39 Wis. 370. And he may also prove the *factum* of his agency and its extent: *Owen v. Cawley*, 36 Barb. (N. Y.) 52; see, also, *Arndt v. Harshaw*, 53 Wis. 269. But, as in the wife's case, an agency must appear; his action without her knowledge or consent will not constitute him her agent: *Case v. Colter*, 66 Ind. 336. Nor will the fact that he went with her when she made the bargain, and afterwards "about the matter of pay," without more, have that effect: *Waggonseiler v. Rexford*, 2 Ill. App. 445.

X. EFFECT OF CONSENT, OR RELEASE OF INTEREST.

(1.) *Consent.*—Upon the effect of the husband's consent that the wife be admitted as a witness against him, the authorities are not in harmony. Some of them take the ground that it is only the *interest* of the husband which excludes her, and inasmuch as an interested witness is competent to testify against his interest, provided he consents to do so, the wife may be properly admitted to testify against her husband's interest, he consenting that she do so: *Pedley v. Wellesly*, 3 Car. & P. 558.

But the better opinion seems to favor her exclusion as a witness against her husband, even though he consents; for the reason that the interest of the husband in preserving the confidence placed in her is not the only ground of the rule. The preservation of domestic tranquillity, and the diminution of temptations to commit perjury, are objects in which society at large is interested, and to admit her as a witness under such circumstances would be opposed to a sound public policy. See *Barker v. Dixey*, Cas. t. Hardw. 264; *Sedgwick v. Watkins*, 1 Ves. Jr. 49; *Randall's Case*, 5 City H. Rec. (N. Y.) 141, 153, 154; *Davis v. Dinwoody*, 4 T. R. 679.

(2.) *Release of interest.*—Clinging to the mistaken idea that individual interest, and not public policy, afforded the ground of the

rule, several highly respectable courts have held that a conveyance by husband and wife to the wife (*Meredith v. Hughes*, 28 Ga. 571), or by the husband to the wife (*Weems v. Weems*, 19 Md. 334). or by both to their children (*Meredith v. Hughes*, *supra*; contra, *Locke v. Noland*, 11 Ala. 249), of all their interest in the issue on trial, rendered them, or the one making such transfer, competent to testify in the cause, notwithstanding the existence of the marital relation. So, also, it has been decided, that the wife of a sole executor of a will, who has renounced, is competent to prove its execution as a will of real estate: *Daniel v. Proctor*, 1 Dev. L. (N. C.) 428; but compare *Huie v. O'Connell*, 2 Jones L. (N. C.) 455; that the wife of one of several co-defendants in foreclosure, who suffers the bill to be taken *pro confesso* as against her, thereby becomes competent for the other defendants: *Hadley v. Chapin*, 11 Paige (N. Y.) 245; that where the payee of a note endorses it to a third person, taking a release from liability thereon, his wife becomes competent for the holder: *Bisbing v. Graham*, 14 Penn. St. 14; *Armstrong v. Noble*, 55 Vt. 428; and that a wife, in the absence of her husband, who has been released from liability in the suit, is a competent witness therein: *Peaceable v. Keep*, 1 Yeates (Pa.) 576. See, also, *Borneman v. Sidlinger*, 21 Me. 185; *Thomas v. Catheral*, 5 Gill & J. (Md.) 23. But it is difficult to bring these cases within the true principle of the rule of exclusion, *i. e.*, that it is not interest only, but *public policy* which closes the door of the witness box.

XI. SURVIVING HUSBAND.—While, as we have seen, the dissolution of the marriage relation by the death of one of the parties, has not the effect of removing the incompetency of the other to disclose matters protected by the rule excluding husband and wife as witnesses for or against each other (*supra*, I.), yet, one having died, the other is competent as to anything the knowledge of which was not obtained through the privacy of the marriage relation: *Wooley v. Turner*, 13 Ind. 253; *Haugh v. Blythe*, 20 Id. 24; *Elswick v. Commonwealth*, 13 Bush (Ky.) 155; *English v. Cropper*, 8 Id. 292. But the husband cannot testify to conversations between himself and his deceased wife: *Dye v. Davis*, 65 Ind. 474; or against the interests of her estate: *Succession of Wade*, 21 La. Ann. 348; but see *Reilly v. Succession of Reilly*, 28 Id. 569, and *Ames's Succession*, 33 Id. 1317, which two cases seem to mean the other way. See, also, *Wood v. Bwillar*, 40 Iowa 591;

Jackson v. Brooks, 8 Wend. (N. Y.) 426; *Wallis v. Britton*, 1 Har. & J. (Md.) 478; *Ayres v. Ayres*, 11 Gray (Mass.) 180; *William & Mary College v. Powell*, 12 Gratt. (Va.) 372.

XII. WIDOW.—So, also, the widow is a competent witness as to matters in which her deceased husband was interested, unless she acquired her knowledge of the facts through confidential communications from him: *Ryan v. Follansbee*, 47 N. H. 100; *Jackson v. Barron*, 37 Id. 494; *Cornell v. Vanartsdalen*, 4 Barr (Pa.) 364; in which latter case she is incompetent: *Lingo v. State*, 29 Ga. 470; *Gray v. Cole*, 5 Harr. (Del.) 418. She may testify as to a conversation had in her presence, or overheard by her, between her husband and a third person: *Pratt v. Delavan*, 17 Iowa 307; *Stuhlmuller v. Ewing*, 39 Miss. 447; *Mercer v. Patterson*, 41 Ind. 440; *Griffin v. Smith*, 45 Id. 366; *Floyd v. Miller*, 61 Id. 224. She may prove her husband's acts, not affecting his character: *McGuire v. Maloney*, 1 B. Mon. (Ky.) 224; or such of his business transactions as were observed by her during his life, or came to her knowledge through sources other than communications by him to her: *Spivey v. Platon*, 29 Ark. 603; *Powell v. Powell*, 2 N. E. Rep. (Ill.) 162; *Short v. Tinsley*, 1 Metc. (Ky.) 397; *Stein v. Weidman*, 20 Mo. 17; *Gaskill v. King*, 12 Ired. L. (N. C.) 211; *Robb's Appeal*, 98 Penn. St. 501.

Thus, she may testify as to the execution, loss and contents of a bond given to her husband: *Carpenter v. Dame*, 10 Ind. 125; or that goods were received by the executor of her husband for which he has not accounted: *Sherwood v. Hill*, 25 Mo. 391; or that a deed of conveyance in which she joined with her husband was only intended to operate as a mortgage: *Price v. Joyner*, 3 Hawks (N. C.) 418; contra, *Eckford v. De Kay*, 6 Paige (N. Y.) 565; or that such a deed, so executed by her, was not fraudulent under the statute of 13 Elizabeth: *Chambers v. Spencer*, 5 Watts (Pa.) 404; or that a parol gift claimed to have been made by her husband, was, in fact, a loan: *Hay v. Hay*, 3 Rich. Eq. (S. C.) 384; or that a pretended purchase from him was never consummated: *Keys v. Baldwin*, 33 Tex. 666. She is also a competent witness in an action against her husband's administrator for her board: *Romans v. Hay*, 12 Iowa 270. She is competent for the executors when she has no interest in the result of the case: *Gebhart v. Shindle*, 15 S. & R. (Pa.) 237.

Where the litigation concerns the real estate of her deceased husband, she is not a competent witness, where the result can either increase or reduce her dower: *Wade v. Johnson*, 5 Humph. (Tenn.) 117; s. p. *Chaney v. Moore*, 1 Coldw. (Tenn.) 48; but if, in such a case, she is not entitled to dower: *Walkingford v. Fiske*, Me. 386, or has released her right: *Dobson v. Racey*, 8 N. Y. 3; *Gayle v. Morrissey*, 5 Sneed (Tenn.) 445, or received her share by consent of the heirs: *Morris v. Harris*, 9 Gill (Md.) 19, she is competent.

XIII. DIVORCED SPOUSE.—Nor will the dissolution of the marriage relation by judicial decree of divorce, or nullity of marriage, restrain the operation of the rule we are examining. As was said by Lord ALVANLEY, "It never shall be endured, that the confidence which the law has created while the parties remained in the most intimate of all relations, shall be broken whenever, by the conduct of one party, the relation has been dissolved:" *Monroe v. Twistleton*, Peake Ev. App. lxxxvii. (xci.); *Aveson v. Lord Kinnersley*, 6 East 192; *Doker v. Hasler*, Ry. & M. 198. Thus, a wife who has been divorced from her husband continues to be incompetent to testify against him in respect to transactions which took place prior to the divorce and during coverture: *Barnes v. Camack*, Barb. (N. Y.) 392; *Cook v. Grange*, 18 Ohio 526; *Perry v. Randall*, 83 Ind. 143; or in his favor, in an action by him against a third person for seducing her: *Rea v. Tucker*, 51 Ill. 110. See also *Rea*, XVI. She cannot testify to threats made to her by her husband, to compel her signature to a conveyance alleged to be void for duress: *Anderson v. Anderson*, 9 Kan. 112. Nor is she competent when the proceeding is instituted to set aside the divorce between herself and her deceased husband: *Fidelity Ins. Co.'s Appeal*, 93 Penn. St. 242; *Peterson v. Peterson*, 13 Phil. (Pa.) 82. It has been held, however, that she may be permitted as a witness against the former husband, to prove a communication not confidential, but which it must have been intended by him at the time, she should make known to the public: *Crook v. Henry*, 25 Ky. 569; see, also, *Storms v. Storms*, 3 Bush (Ky.) 77, as to the competency of a divorced husband.

XIV. CASES OF PERSONAL INJURIES.—Where the ground of action is a personal injury sustained by the wife at the hands of a third person, the authorities are not in entire harmony as to the husband's competency to testify. In Georgia, the wife having been

assaulted, the husband was not permitted to testify that she delayed to complain to him : *Goodrum v. State*, 60 Ga. 509 ; see also *Pillow v. Bushnell*, 5 Barb. (N. Y.) 156. In Wisconsin, when both sue for injuries to the person of the wife, caused by the defendant's negligence, the husband is deemed the real party in interest, and may testify in support of the action, whatever the rule may be as to actions in which he is only a nominal party : *Kaine v. Omro Trustees*, 49 Wis. 371 ; *Barnes v. Martin*, 15 Wis. 240 ; and the wife is also competent in such cases tried in the United States Circuit sitting in that state : *Packet Co. v. Clough*, 20 Wall. (U. S.) 528. The rule was the same in Massachusetts, under chapter 188 of the Act of 1856 : *Snell v. Westport*, 9 Gray (Mass.) 321 ; but see *Bunker v. Bennett*, 103 Mass. 516, where a contrary rule is laid down under a later statute ; and is the same in Vermont : *Simpkins v. Eddie*, 56 Vt. 612. In New Hampshire, where the husband died after the injury to the wife, but before suit brought, the wife was held a competent witness : *Winship v. Enfield*, 42 N. H. 197. And in Vermont, where the wife sued a liquor dealer, under the "civil damage act," for injuries sustained by reason of the intoxication of her husband, the latter was held a competent witness for the plaintiff : Acts 1874, No. 27 ; *Snow v. Carpenter*, 49 Vt. 426. As to actions for malicious prosecution, see *Anderson v. Friend*, 71 Ill. 475 ; *Mitchinson v. Cross*, 58 Id. 366. Actions for slander of the wife, see *Hawver v. Hawver*, 78 Ill. 412 ; *Moussler v. Harding*, 33 Ind. 176 ; *Bennifield v. Hypres*, 38 Ind. 498 ; *Duval v. Davey*, 32 Ohio St. 604. Actions for mal-practice, see *Womack v. McQuarry*, 28 Ind. 103.

XV. ACTIONS FOR DIVORCE, OR TO ANNUL THE MARRIAGE.—

The action being for divorce, the husband has been held competent to prove the wife's desertion of him : *Stebbins v. Anthony*, 5 Col. 348. So, also, the wife being complainant, she was allowed to testify as to her husband's habits of intoxication and general treatment of her : *Smith v. Smith*, 77 Ind. 80 ; *Burdette v. Burdette*, 2 Mackey (D. C.) 469. But the great weight of authority, especially where the ground of divorce is adultery, excludes both parties from testifying except to sustain the validity of the marriage to dissolve which the action is brought. Such is the law in Louisiana : *Dillon v. Dillon*, 32 La. Ann. 643 ; *Daspit v. Ehringer*, Id. 1174 ; see, also, *Shantz v. Stoll*, 34 Id. 1237 ; and, until very recently, in New

sey: *Marsh v. Marsh*, 2 Stew. (N. J.) 396; *Dougherty v. Dougherty*, 5 Id. 32; and in New York: *Van Cort v. Van Cort* Edw. (N. Y.) 621; *Rivenburgh v. Rivenburgh*, 47 Barb. (N. Y.) 9; *Hennessey v. Hennessey*, 58 How. Pr. 304; *Lincoln v. Lincoln*, 6 Rob. (N. Y.) 525; *Finn v. Finn*, 12 Hun 339; and see, *Abable v. Abable*, 24 How. Pr. 92. It seems the husband may prove the wife's impotence: *Barringer v. Barringer*, 69 N. C. 9; but not her adultery: *Cook v. Cook*, 46 Ga. 308. In Pennsylvania, the parties to the divorce may testify in their own favor, cannot be compelled to testify against themselves: *Bronson v. Bronson*, 8 Phil. (Pa.) 261. They are excluded in Texas: *Cornish v. Cornish*, 56 Tex. 564, and admitted in Massachusetts, where the proceeding is for a decree of nullity, under the statute: Gen. St. 107, § 4; *Foss v. Foss*, 12 Allen (Mass.) 26.

When the proceeding is a collateral one, *e. g.*, when a creditor of the husband sues to annul a judgment of separation of property between the husband and wife, the latter has been held competent to testify: *Keller v. Vernon*, 23 La. Ann. 164.

XVI. ACTIONS FOR ABDUCTION, OR FOR CRIMINAL CONVERSATION.—It is held in Minnesota, that even in an action by the husband against one who entices away the wife, when the defence is ill-treatment of her, the wife cannot be a witness against her husband without his consent: *Huot v. Wise*, 27 Minn. 68; but the contrary was held in New York, in a proceeding to regain the custody of the wife by the writ of *habeas corpus*: *People v. Mercein*, Paige (N. Y.) 47, and also in Pennsylvania, where her declarations immediately before and at the time of her leaving him, respecting his ill-treatment of her, were admitted in behalf of the defendant charged with enticing her away: *Gilchrist v. Bale*, 8 Watts (Pa.) 355.

In actions for criminal conversation the majority of the adjudications exclude the wife from testifying for the plaintiff: *Carpenter v. White*, 46 Barb. (N. Y.) 291; *Hicks v. Bradner*, 2 Abb. (N. Y.) 362; *Mathews v. Yerex*, 48 Mich. 361, unless a divorce has been obtained previous to the trial, when she is competent as to facts occurring after the divorce, in which her husband did not participate: *Cross v. Rutledge*, 81 Ill. 266; or, according to several highly respectable authorities, even to prove the charge laid in the declaration: *Dickerman v. Graves*, 6 Cush. (Mass.) 308; *Ratcliff*

v. Wales, 1 Hill (N. Y.) 63; *Woltrich v. Freeman*, 71 N. Y. 601.

XVII. CRIMINAL ACTIONS.

(1.) *In general*.—We have already seen that one of the exceptions to the common-law rule excluding husband and wife as witnesses, is, that in collateral proceedings, they may testify to facts which even tend to criminate each other: *supra*, VIII.; *Commonwealth v. Reid*, 8 Phila. (Pa.) 385; s. o. 1 Leg. Gaz. Rep. 132; but see *State v. Wilson*, 2 Vr. (N. J.) 77. Where, however, a criminal prosecution is instituted against either spouse, the other is generally excluded as a witness either for or against the one on trial, both on grounds of public policy, and in order to lessen the temptation to commit perjury: *Lucas v. State*, 23 Conn. 18; *William v. State*, 33 Ga. (Supp.) 85; *Byrd v. State*, 57 Miss. 243; *Downing v. Rugar*, 21 Wend. (N. Y.) 178; *Wilke v. People*, 53 N. Y. 525; *People v. Briggs*, 60 How. (N. Y.) Pr. 17; *People v. Moore*, 65 Id. 177; *Taulman v. State*, 37 Ind. 353; and the so-called "enabling acts" have not affected this rule, their operation being, for the most part, confined to civil causes: *Turpin v. State*, 55 Md. 462; *Com. v. Gannon*, 97 Mass. 547; *Com. v. Welch*, Id. 593; *State v. Armstrong*, 4 Minn. 335; *State v. Moulton*, 48 N. H. 485; *People v. Crandon*, 17 Hun (N. Y.) 490; but compare *People v. Comm'rs of Charities*, 9 Id. 212; *Steen v. State*, 20 Ohio St. 333; *Shultz v. State*, 32 Id. 276; *Gibson v. Com.*, 87 Penn. St. 253.

Where, however, the cohabitation is meretricious, and not pursuant to a lawful marriage, the rule has no application: *Rickenstriker v. State*, 31 Ark. 207; *Mann v. State*, 44 Tex. 642; and the fact that the alleged marital relation does not exist may be proved by the witness on the *voir dire*: *State v. Brown*, 28 La. Ann. 279. But the converse, it seems, is not true, i. e., where the prosecution has shown an actual marriage between the defendant and one of its female witnesses, *prima facie* valid and in good faith, upon which the defendant might reasonably and honestly rely as valid, and upon which he did rely at the trial, the prosecution cannot introduce opposing testimony in order to establish the invalidity of the marriage, so as to make the alleged wife a competent witness against the defendant: *Dixon v. People*, 18 Mich. 84.

Various statutory modifications of the rule have been made in many of the states; thus, in Kansas, the wife of the accused is competent for the state if she voluntarily testifies against her hus-

She cannot be compelled to do so: *State v. McCord*, 8 232. But she may be so compelled in Maine: Stat. 1873, 37, sect. 5; *State v. Black*, 63 Me. 210. In New York she testify in her husband's favor, but cannot be compelled to be a witness against him. The husband, however, may compel her testimony, and his failure to call her is properly the subject of comment to the jury: *People v. Hovey*, 92 N. Y. 554; s. c., 29 382. In North Carolina and Rhode Island, where the husband is the complainant against the one charged with assault the husband has been held a competent witness in the case, either to support the prosecution or to contradict her husband's testimony for the same: *State v. Parrott*, 79 N. C. 615; *State v. Borden*, 6 R. I. 10. In Texas, husband and wife are competent for each other in criminal cases, but not against each other: *Griffin v. State*, 32 164 (where the right of the prosecution to cross-examine was denied); *Creamer v. State*, 34 Tex. 173 (where such right was sustained); and if either be competent against the person on trial the same is also: *Daffin v. State*, 11 Tex. App. 76.

2.) *Offences committed by one against the other.*—Where the person on trial is a personal injury alleged to have been committed upon the husband upon the wife, or *vice versa*, the injured spouse is a competent witness in favor of the one on trial: *People v. Fitzpatrick*, 5 Park. Cr. (N. Y.) 26; compare *Bihin v. Bihin*, 17 Abb. Pr. (N. Y.) 19, or on the part of the prosecution: *People v. Carpenter*, 9 Barb. (N. Y.) 580. Thus, the husband being indicted for assault and battery upon his wife, she is competent to testify against him: *United States v. Fitton*, 4 Cranch C. C. 668; *United States v. Smallwood*, 5 Id. 35; *Turner v. State*, 60 Miss. 351; 45 Am. Rep. 412, at least, where a lasting injury is inflicted or threatened to be inflicted upon her: *State v. Hussey*, Busb. L. 123; *State v. Davidson*, 77 N. C. 522, or where no other person was present when the offence was committed: *State v. Davis*, 107 (S. C.) 3; and it seems she is compellable to testify in such cases: *Turner v. State*, *supra* (which case decides that it is her duty to testify or not as she may elect. Her husband cannot object to the action of the court in compelling her to give evidence over his objection). So, also, she may testify against her husband on his trial for attempting to poison her: *People v. North*, 10 Barb. (N. Y.) 147, or for using an instrument with intent to kill her to miscarry: *State v. Dyer*, 59 Mo. 303, or on his

trial for abandoning her: *State v. Brown*, 67 N. C. 470 (only to prove the fact of abandonment, however, not to prove the marriage). She cannot, however, testify against him on his trial for conspiring to obtain a divorce, unless the indictment charges the commission of personal violence upon her, or the intention to commit it: *Com. v. McEwan*, 1 Pa. L. J. Rep. 140, or on his trial for suborning witnesses to wrong her in a judicial proceeding: *People v. Carpenter*, 9 Barb. (N. Y.) 580. Nor can she be a witness against him on his trial for the larceny of her property: *Overton v. State*, 43 Tex. 616; *R. v. Brittleton*, 12 Q. B. D. 266; s. c., 32 W. R. 463, or for incest with her daughter by a former marriage: *Compton v. State*, 13 Tex. App. 271; s. c. 44 Am. Rep. 703; overruling *Morrill v. State*, 5 Tex. App. 447, and *Roland v. State*, 9 Id. 277.

On the other hand, on her husband's trial for assault and battery upon herself, she may testify in his favor to disprove the charge: *State v. Neill*, 6 Ala. 685; *Com. v. Murphy*, 4 Allen (Mass.) 491; *Tucker v. State*, 71 Ala. 342; for it is well settled that when, in any case, husband and wife are competent witnesses against each other, they are also competent witnesses for each other: *Tucker v. State*, 71 Ala. 342. So, where the wife is prosecuted for assaulting the husband, he is a competent witness against her: *Whipp v. State*, 84 Ohio St. 87; see, also, *People v. Marble*, 38 Mich. 117; contra, *Turnbull v. Com.*, 79 Ky. 495.

(3.) *Wife of party jointly indicted.*—Another exception to the general rule is that where, upon a joint indictment, there is a separate trial the husband or wife of the defendant not put upon trial, is not necessarily incompetent as a witness for the prosecution. If willing to testify, he or she is competent, except, perhaps, where the offence is in its nature joint, as in conspiracy: *Com. v. Reid*, 8 Phila. (Pa.) 385; s. c. 1 Leg. Gaz. Rep. 182; *State v. Dawdy*, 14 Rich. (S. C.) 87, where the acquittal of one defendant works the acquittal of the others: *United States v. Addate*, 6 Blatchf. (U. S.) 76; *Williams v. State*, 69 Ga. 11; but see to the contrary, *State v. Bradley*, 9 Rich. (S. C.) 168; *State v. McGrew*, 13 Id. 316; *State v. Burlingham*, 15 Me. 104. Where the husband is suspected, but not indicted, and the defendant seeks to show the husband to be the guilty party, the wife may testify to facts exculpatory of her husband: *Fincher v. State*, 58 Ala. 215.

also, the wife of one of three jointly indicted defendants is competent against the other two, after the indictment has been dismissed as to her husband: *Ray v. Com.*, 12 Bush (Ky.) 397; not, it seems, before such dismissal: *Dill v. State*, 1 Tex. App.

And where the husband is defaulted on his recognisance, the wife becomes competent for the other defendant: *State v. Worthing*, 1 Tex. App. 62. Indeed, she is generally held competent in such cases when she is offered as a witness *in favor* of the defendant on trial: *Rampson v. Com.*, 1 Metc. (Ky.) 13; *Cornelius v. Com.*, 8 Id. 31; *State v. Burnside*, 37 Mo. 343; *Com. v. Manson*, 2 Ashm. 31; *Moffit v. State*, 2 Humph. (Tenn.) 99; *Workman v. State*, 4 Sneed (Tenn.) 425; although respectable cases are not wanting which hold the other way: *United States v. Wade*, 2 Fed. C. C. 680; *Collier v. State*, 20 Ark. 36; *Pullen v. Peop.*, 1 Doug. (Mich.) 48.

Where the trial as well as the indictment is joint, it is pretty well settled that the wife of one defendant is not a competent witness against any of the others: *Commonwealth v. Easland*, 1 Mass. 15; *State v. Robinson*, 1 Gray (Mass.) 555; *State v. Waterman*, 15 N. H. 540; *Mask v. State*, 32 Miss. 405; but see *Morrissey v. State*, 11 Mich. 327; *State v. Waterman*, 1 Nev. 543.

(4.) *Wife of accomplice, or state's witness.*—Where the husband has testified as an accomplice, or state's witness, his wife is a competent witness to corroborate his testimony: *State v. Moore*, 25 N. H. 128; *Haskins v. Peop.*, 16 N. Y. 344; *Blackburn v. Commonwealth*, 12 Bush (Ky.) 181; *Williams v. State*, 69 Ga. 11; especially where he has not been indicted, though evidently an accomplice: *Powell v. State*, 58 Ala. 362. So, also, she may prove independent facts not sworn to by her husband, and not forming any part of his acts, although those facts fasten a guilty verdict on the defendant: *United States v. Horn*, 5 Blatchf. (S.) 102. She may also testify on the other side, to show that her husband testified under a bias against the defendant, but not to contradict him: *Cornelius v. State*, 12 Ark. 782. See, also, *Clubb v. State*, 14 Tex. App. 192; *State v. Mooney*, 64 N. C. 54.

(5.) *Wife of person injured by the crime.*—At common law, where the person whose goods were stolen was not interested in the execution of the thief, his wife was a competent witness for prosecution, but where the husband was himself disqualified by

reason of an interest in the fine, she was not competent: *United States v. Shorter*, 1 Cranch C. C. 315. But this rule of exclusion of the wife because of the husband's interest in the event is now swept away by the enabling acts, along with the incompetency of the husband himself—the person injured—on account of his interest. When the prosecution is for the homicide of the husband, the widow is a competent witness to prove his dying declarations: *State v. Ryan*, 30 La. Ann., part 2, 1176.

(6.) *Rules peculiar to prosecutions for adultery.*—Upon the question whether, upon a criminal prosecution for adultery, the husband or wife, of either of the guilty persons, shall be admitted to testify for the prosecution, the decisions are in direct conflict. Some of them hold that under statutes permitting husband and wife to testify against one another on a criminal prosecution, for an offence committed by one against the other, the one may testify against the other on an indictment of the other for adultery: *Roland v. State*, 9 Tex. App. 277: s. c. 35 Am. Rep. 743; *Alonzo v. State*, 15 Tex. App. 378; *Morrill v. State*, 5 Id. 447; *Lord v. State*, 23 N. W. Rep. 507. In Wisconsin it is held that after a divorce *à vinculo*, the husband is competent to prove the marriage on an indictment against another for adultery with the wife, before divorce: *State v. Dudley*, 7 Wis. 664.

Many cases, however, of equal respectability are found which lay down the contrary rule. Thus, the Supreme Court of Alabama holds that the husband of a woman jointly indicted with her paramour for living in adultery, is incompetent to testify against either of them: *Cotton v. State*, 62 Ala. 12. In North Carolina, he cannot testify against the female defendant (his wife), even though he may have obtained an absolute divorce before the trial of the indictment: *State v. Jones*, 89 N. C. 559 (where, however, he was permitted to testify in her favor); nor can he testify for the prosecution in Pennsylvania: *Commonwealth v. Gordon*, 2 Brewst. (Pa.) 569; *Commonwealth v. Flohr*, 3 Crim. L. Mag. 841; and the same has been held in Maine, Massachusetts and Texas: *State v. Welch*, 26 Me. 30; *Commonwealth v. Sparks*, 7 Allen (Mass.) 534; *Thomas v. State*, 14 Tex. App. 70; see also to same effect, *State v. Gardner*, 1 Root (Conn.) 485; *Commonwealth v. Jailer*, 1 Grant Cas. (Pa.) 218; and see *People v. Hendrickson*, 19 N. W. Rep. 169.

(7.) *Rules peculiar to prosecutions for bigamy.*—Here, too, cases are in conflict, some of them holding the first wife of the bigamist competent to testify against him, on the ground that his second marriage is an offence committed against her: *State v. Sloan*, 13 Chic. L. N. 145; see also, *People v. Houghton*, 24 (N. Y.) 501; *State v. Hughes*, 58 Iowa 165; *Williams v. State*, 67 Ga. 260. So, also, the second wife been admitted to testify for the prosecution: *Johnson v. State*, 61 Ga. 305; *Finney v. State*, 3 Head (Tenn.) 544. But the true rule as to the second wife is believed to be the following, recently laid down by the Supreme Court of the United States: "The ground upon which a second wife is admitted as a witness against her husband, in a prosecution for bigamy, is that she is shown not to be a real wife, but proof of the fact that the accused had previously married another woman who was still living, and still his lawful wife. It is only in the first marriage is not controverted, or has been duly established by other evidence, that the second wife is allowed to testify, and she can then be a witness to the second marriage, and not to the first:" *Miles v. United States*, 103 U. S. 304, 313; s. c. 2 U. S. L. Mag. 489; reversing, 2 Utah T. 19, and reviewing the English cases.

STEWART RAPALJE.

RECENT AMERICAN DECISIONS.

Supreme Court of Minnesota.

NEWELL v. MINNEAPOLIS, L. & M. RAILWAY CO.

The public easement in a public street is the public and common right to use the street for the passage of persons and property, and for purposes incidental to such use.

The owner of the soil over which a street is laid has the right to insist that a street be used for the legitimate purposes of its creation and existence, and in a manner proper to effectuate the same.

When a street is being used for the purpose (legitimate in its general nature) of the passage of persons and property, but objection is made to the *mode* of use, the question of *rightfulness* depends upon whether the use objected to is consistent or inconsistent with the common public use in which every person is entitled to share. The question of consistency or inconsistency is a question of law. That is to say, when the facts of a given case being ascertained, it is for the court to pronounce upon the effect, and to determine whether a manner of using a street complained of is, or is not, all things considered, a substantial infringement upon the common public

Held, in the application of the foregoing principles to the particular state of facts found in this case, and given in detail in the opinion, that the use of a public street in the city of Minneapolis by defendant, with the permission of the public authorities for the construction and operation of its railway, is the use of it in aid of the street as a passenger street railway, and not the imposition upon the soil of the street of a servitude additional to the proper street easement. And this notwithstanding the fact that said railway is operated by steam, and is used for the purpose of transporting persons from the terminus within the city to a point eighteen miles outside of the city limits, as well as for transporting persons from one point in the city to another, and that outside of said limits it is, to some extent, operated as an ordinary commercial railway.

MITCHELL, J., dissents.

Appeal from an order of the District Court, Hennepin county.

Hart & Brewer and *A. L. Levi*, for appellant.

Cross, Hicks & Carleton, for respondent.

The opinion of the court was delivered by

BERRY, J.—Plaintiff is owner of certain land abutting on a public street in Minneapolis called “First Avenue South,” and therefore owner of the fee of the half of the street adjoining his premises, subject to the street easement. As the complaint alleges, defendant—a railway corporation, and assuming to act as such—has wrongfully entered upon plaintiff’s portion of the street, and taken possession thereof for its road-bed, laying down ties and rails thereon, and using and continuing in possession thereof for the operation of its railway, all without plaintiff’s consent, and without payment of compensation. The plaintiff brings this action in the nature of ejectment for a restitution. In our judgment the case can present but two questions:

1. Is the construction, maintenance, and operation of defendant’s railway the imposition upon the soil of First Avenue South, adjacent to plaintiff’s premises, of a servitude additional to the proper public easement in such street? If this question be answered in the affirmative, the case is at an end, for the addition servitude (if any there be), having been imposed upon plaintiff’s soil without his consent, and without compensation, he is entitled to put a stop to its continuance. But if the question be answered in the negative, then the second question is, can the *plaintiff* object to defendant’s use of the street for the purposes of its railway?

To answer the first question it is necessary to consider to some extent the nature of a street easement. The public easement in a public street is the public and common right to use the same for the

age of persons and things, and for purposes incidental thereto. The exercise of this right is subject, in some degree, to regulations made by the proper authorities. The ownership of the soil which the street is laid being absolute, subject only to the street easement, the owner has the right to insist that the street shall be used and enjoyed for the legitimate purposes of its creation and maintenance, and for no others. As the right of use is public and common, every member of the public, *i. e.*, every person, is entitled to avail himself of it; and hence no person can lawfully monopolize the use, or, what would amount to the same thing, use it so as to exclude any other person from it.

This proposition is, however, not to be understood as trenching on any right which the public authorities may possess to prescribe purposes for which a particular street shall be used; as, for instance, for light or heavy traffic, as the case may be. *How* the monopolizing of the use of a street, or the illegal exclusion of any person from it, is accomplished, cannot be important. They may be effected either by an appropriation or occupation of the entire surface of the street, or by the use of a part of it in such way as to render its legitimate use by others impracticable, and thus practically deprive them of its use altogether. Thus, for instance, an ordinary railroad, constructed and operated in and along a street, though it is used for the passage of persons and property, and is therefore, so far as this general nature of its business is concerned, using the street for proper street purposes, yet the mode of its construction or operation, or both, are such as to monopolize the street, and virtually and practically exclude the general public from its legitimate use; so that the use of the street for such railroad is inconsistent with the common and public use of it, in which every person is entitled to share, and hence it is held to be the imposition on the soil of a servitude differing from, and additional to, that of the proper and lawful street easement. The case of an ordinary street railway is otherwise. There the street is also used for the passage of persons and property, but in such manner as not, substantially, to interfere with the common and public right of every person to use the street also; and so the use of a street by such street railway is held not to be the imposition of an additional servitude. So when a street is being used for the purpose (legitimate in its general nature) of the passage of persons and property, but objection is made to the *mode* of use, the question of rightfulness depends

upon whether the use objected to is consistent or inconsistent with the common public use, in which every person is entitled to share.

This question of consistency or inconsistency is a question of law; that is to say, the *facts* of a given case being ascertained, it is for the court to pronounce upon their effect, and to determine whether a manner of using a street complained of is or is not, all things considered, a substantial infringement upon the common public right. We say a *substantial infringement*, *all things considered*, because it is not every mere inconvenience or temporary hindrance to which one person, in using a street, may be subjected by the manner in which another uses it, which presents a case of inconsistency with the common public right. The inconsistency must be such that the common public use cannot, in its substantial integrity, co-exist with the use complained of. If the existence of the latter is inconsistent with the substantial integrity of the former, then the latter cannot stand as a proper and lawful use of the street easement. If the use complained of is such that the public and common right of passage of persons and things cannot be enjoyed without substantial impairment on account of the *manner* of such use, then it is inconsistent with the public and common right, and not a proper and lawful use of the easement of the street. But no merely technical or trifling interruption or obstruction is to be regarded as a substantial impairment, for common sense requires that these words should receive a reasonable and liberal construction, and it must always be borne in mind that in organized civil society the individual must necessarily enjoy a common public right with reference to the general convenience and the rights of others. The foregoing rules and principles are, in our judgment, fully supported, either directly or by logical deduction, by *Carli v. Stillwater S. R. & T. Co.*, 28 Minn. 373, and the authorities there cited.

It remains to apply them to the facts of this case as found by the court below to exist when this action was commenced, which, so far as deemed material for this purpose, are as follows: At the time when this action was commenced defendant's railway extended from near the westerly end of the suspension bridge, a central place in the city of Minneapolis, for a distance of one and a half to two miles within the city limits; thence via Lakes Calhoun and Harriet for a further distance of about eighteen miles to Lake Minnetonka. Defendant's line of railway is a single track of three-feet gauge

th occasional turn-outs), and so laid with a light T rail that the of the rail conforms to the surface grade of the street or roadway, and so planked at the sides of the rails, and filled and graded between the rails, that the track does not interfere with the passage of vehicles, or with any use of the highway, more than do the flat tracks, well laid, of the ordinary horse railroad. The passenger cars are from 34 to 37 feet long, and so constructed that travellers can easily step on or off the same to or from the street or road. Within the city, and as far out as Lake Calhoun, they are drawn either singly or in trains of from two to four cars, and, on rare occasions, a greater number than four cars, by Baldwin motors, which are all steam-engines entirely encased in cabs, so that no part of the machinery is visible from the outside, and from 19 to 21 feet long, giving the appearance of a short car, except that a smoke-pipe at nine inches in diameter stands a foot or more above the top of the cab. No bell or whistle is used. The steam is exhausted from the engine. Anthracite coal is used for fuel, making little or no smoke, and neither smoke nor steam is often perceptible. Between Lake Calhoun and Minnetonka a narrow-gauge locomotive engine is used to draw some trains, and some are drawn by the motors. Several trips or more each way per day have been regularly made between the city terminus of the railway and Lake Calhoun, but a number between Lakes Calhoun and Minnetonka. The cars are moved along First Avenue South, past plaintiff's land, and through all the closely-settled portion of the city, at a speed of one to four miles an hour, and are furnished with air-brakes, and can be stopped in the distance of from two to six feet. Between the closely-settled portions of the city and Lake Calhoun the speed is greater, reaching six miles an hour, and between Lakes Calhoun and Minnetonka it is increased in some places to fifteen miles an hour or more. There are no depots, stations, or platforms connected with said railway, but within the city, and as far out as Lake Calhoun, the passengers are taken on and let off along the street, and at street crossings, whenever they choose, as is customary on street railways. The uniform fare for passengers within the city limits, existing when this action was brought, has been five cents, with the same fare for persons residing near the line of the railway as far out as Lake Calhoun. Higher rates of fare for other persons travelling between the city and the lakes, and between the lakes or points outside of said city limits, have been fixed and received.

Between Lakes Calhoun and Minnetonka the cars stop to take up and discharge passengers at any highway crossing. Within the city, as bounded when this action was commenced, defendant's railway has been operated solely for the carriage of passengers, and a large share of its business and income has arisen from passengers carried thereon from point to point, as they might desire, along the streets traversed by said railway. In the warm season it also carries many passengers gathered up along such streets to said lakes, and back again, such lakes being suburban resorts, frequented in such seasons by inhabitants of, and sojourners in, said city. Between Lake Minnetonka and a point near, but outside, the recent boundary of the city, said railway has carried some cord-wood and other freight.

These are, in substance, the facts found by the trial court upon the branch of this case now under consideration, and upon them our decision must be based; for they are supported by the evidence, and if it be true that upon any particular point or points the evidence would warrant fuller or other findings, that defect (if it exists) should have been remedied upon a motion to correct the findings before bringing the case to this court. Upon its findings of fact the trial court was of opinion, and so found, as conclusions of law, (2) that defendant's railway, as constructed and operated on First Avenue South, and elsewhere within the limits of the city as bounded when this action was commenced, was and is a passenger street railway, and this character is not changed by the fact that between some point outside of said city limits and Lake Minnetonka it ceases to be a passenger street railway; (3) that the construction and operation of said railway partly on that part of First Avenue South of which the "ultimate fee" is in the plaintiff does not constitute any additional burden or servitude beyond the public easement contemplated in the dedication of the street, nor any taking or appropriation of the property of the plaintiff as owner of the fee.

Both of these conclusions are, in our judgment, correct.

The first clause of the first, viz., that defendant's railway is a passenger street railway, is in effect a finding that its use consists in the transfer of persons along or over the streets within the city, and would seem to be a mere result or summing up of the previous findings of fact upon that subject, and it is therefore, perhaps, quite as much in the nature of a conclusion of fact as a conclusion of law. It is enough to say in regard to it that it is the legitimate

of the previous findings of fact. The last clause of this decision, viz., that this character of the railway is not changed by the fact that at some point outside of the city it ceases to be a passenger street railway, is right as a conclusion of law. If it is, that, a passenger street railway within the city limits, how can it become anything else *there* because it becomes something else *there*? A person who desires to go from any part of Minneapolis to San Francisco has the same right to use the streets of the city for the purpose of passing out of it on his way to his destination as a person who simply desires to pass from one place in Minneapolis to another in the same city. The use of the streets is as legitimate, and just as clearly and completely a lawful and proper enjoyment of the public and common easement, in the one case as in the other.

Take the case of an old-fashioned stage line, taking its passengers from its station, say at the Nicollet House, in Minneapolis, and carrying them to Shakopee, would it ever occur to any one that the use for that purpose of the streets of Minneapolis as far as they extended on the way would not be entirely legitimate, and entirely proper for the purposes of dedication, because the streets used were but a part, and small part, of the entire route of the line, and the line was run exclusively for the purpose of conveying persons to and from places outside of the city of Minneapolis? Or is it any objection to the use of a street by a horse railway that the line extends into the country, and carries passengers accordingly. Such illustrations (and they could be multiplied indefinitely), as it seems to demonstrate the correctness of the conclusion arrived at by the court, which we are now considering. It cannot be that a use of the streets of a city can be made improper by the fact that the instrumentalities through which that use is enjoyed, are changed, as respects their mode of operation, after the city boundaries are passed over, or that the use of the streets of a city for the purpose of going out of it, or of coming into it, can be improper or illegitimate, or in any sense the imposition of a servitude additional to the ordinary street easement.

The other conclusion of law, viz., that the construction and operation of defendant's railway does not impose any additional burden, etc., has given us more trouble: for while the previous finding that defendant's railway is, within the city limits, a passenger street railway may be true in the sense that it is *there* a railway

used and operated exclusively, or substantially so, for the transportation of passengers from one part of the city to another, still that fact alone and by itself would not materially distinguish it from what is styled by counsel an ordinary "commercial railway," used exclusively to bring passengers into, or carry them out of, the city. Yet this ordinary commercial road (so called) has been held by this court, in several cases, as well as by a majority of the courts in other states, to impose a servitude additional to the ordinary street easement, and therefore to infringe the rights of the owner of the soil over which the street is laid. It is otherwise, however, with the ordinary horse street railway. Where, then, is the distinction? Both are used for the conveyance of persons from one part of the city to another, and in that sense both are street railways, and both operated in aid of the street, to facilitate the passage of persons over the same. We think the answer to the question is found in the general rules and principles laid down, and to some extent expounded, in the early part of this opinion.

A railway upon a street, engaged in carrying persons and things over the same, whether from one point to another on such street or in the city, or from points inside to those outside, or *vice versa*, is or is not rightfully using the street (with, of course, the sanction of the proper authorities), according as its use is or is not consistent with the common public use of the street, in which every person is entitled to share. Now, whatever facts may *exist* in this case, or whatever facts may have been shown which are not embraced in any finding, there is nothing in the findings of fact from which it can be inferred, as a conclusion of law, that defendant's use of the street, in constructing, maintaining or operating its railway, is inconsistent with the common public use; nothing to show that the two uses may not co-exist without any substantial infringement or interruption of the latter by the former; while, so far as construction and maintenance are concerned, the facts are expressly found that the surface of the street is not essentially changed or disturbed. There is no fact found showing that the *operation* of defendant's railway seriously jeopardizes or interferes with the safety and security or convenience, as respects either person or property, of any one who desires to avail himself of the public and common right of user. It may well be that defendant's railway *could* be so operated, even as a purely passenger street railway, as substantially to interfere with, if not to put a practical end to, the use of the street by the general public.

It is not impossible to conceive that an ordinary horse street railway could be operated with like effect. Suppose, for instance, that a horse railway were permitted to occupy the entire breadth of a street with its tracks, and to run its cars at the rate of one in one or two minutes, what would be the value of the ordinary street easement in such a state of facts? This illustration is, as it seems to us, in point for the purpose of showing that the *manner* and *effect* of operating a street railway are the tests of its rightfulness; and while the *manner and effect* of operating defendant's railway might have been such as to interfere substantially with the public and common right, the findings do not show that it was so in this case, which, as it is important to bear in mind, was tried with reference to the state of facts set up in the pleadings as subsisting at the time when this action was commenced.

The railway in question in *Carli v. Stillwater S. R. & T. Co.*, *supra*, was neither more nor less than a connecting link between two ordinary (so called) commercial railways. The effect was the same as if one of these railways had been extended over it to a junction with the other, so that the railway in that case was really and in effect an ordinary "commercial railway, and in no sense in aid" of the street. Upon this ground the opinion and determination in that case proceeded, holding that under the decisions of this court, and in accordance with the view prevalent elsewhere, that as such ordinary commercial railway it imposed a servitude upon the street additional to the proper street easement. But the defendant's railway is a different thing, and clearly *in aid of the streets* over which it runs. It takes on and discharges passengers at any street crossing upon its line, as does an ordinary horse railway; and this practice applies as well to those who get on for the purpose of going out of the city or of coming into it, as to those who get on and also get off within the city limits. Such a railway is in aid of the street because it facilitates the passage of persons over the street, enabling them, in large numbers, to pass over it with far less noise, trouble and expense than if each should pass on foot or in an ordinary vehicle, and without, so far as this case shows, any substantial interference with the public and common right of passage. Upon all these considerations we therefore conclude that defendant's railway was, within the city, properly a street railway; and that its construction, maintenance and operation do not impose upon plaintiff's soil a servitude additional to that of the ordinary street ease-

ment, so as to make defendant's use of the street unlawful without compensation to plaintiff.

Having thus answered the first main question presented in this case in the negative, we are brought to consider the second, viz.: Can the *plaintiff* object to defendant's use of the street (in the manner found by the trial court) for the purposes of its railway? We say whether the *plaintiff* can object, because if he cannot it makes no difference *in this action* whether defendant *has in fact* any legal right to construct, maintain, and operate its railway on First Avenue South or not. The plaintiff having, as we have seen, no right to object on the ground that defendant's use of the street imposes a servitude additional to the proper street easement, his objection, if any, must be that defendant is not authorized to use the street easement in the way in which it does. The charter of the city of Minneapolis commits the care, supervision and control of the streets to the common council. By ordinances passed March 22d (1882), before this action was commenced (in November, 1882), and subsequently, the council gave defendant permission to operate its railway, and with steam-power, on First Avenue South, and other streets, to June 1st (1883), a date subsequent to the trial of this action. As a result of this, and of the conclusion arrived at upon the first branch of the case, the defendant was in fact lawfully in its possession (such as it was) and use of the street, so far as the public authorities were concerned. It had, at least, their license and acquiescence in its favor.

But it seems that by an ordinance of July 9th (1875), a corporation denominated the Minneapolis Street Railway Company was granted the exclusive right, subject to conditions not here important, of constructing and operating street railways in the city of Minneapolis, in such streets as the city council may deem suited to that purpose; and by ordinances of July 3d and 8th (1878), said "company," its successors and assigns, were authorized, upon similar conditions as above, to construct and maintain a street railway line on First Avenue South, and other streets (being the route of defendant's railway); and "to operate such line of railway with animal, steam, or other power, the right to prohibit the use of steam when the public good required being reserved." On October 24th (1878), The Minneapolis Street Railway Company and the defendant, pursuant to authority given by their respective boards of directors, formally entered into a written contract, whereby, among other

s, and for a sufficient consideration, the street railway company d to the latter, for forty-three years, its rights and franchises, to se for suburban railway purposes, of First Avenue South, and other streets, and the lease was duly recorded November 17th 88). Immediately upon the execution of this contract defendant entered upon First Avenue South, and the other streets mentioned, and at large expense, constructed thereon its railway, which ever since maintained and operated, no other railway having constructed on that route.

w, upon this state of facts, and with reference to the conclusions arrived at upon the first branch of this case, both the public utilities and the street railway company appear to acquiesce in defendant's use of the streets. It matters not whether defendant is acting strictly within the terms of its charter or of the lease from the street railway. It is *there upon the ground*, in actual possession (so far as necessary) and use of the streets. Whether it is there as a corporation, association, or partnership; whether in the exercise of its lawful corporate franchises, *de jure*—so long as its use of the streets is a proper street use under sanction of public authority—the *plaintiff* cannot com-

If the exclusive franchise of the street railway company is denied, either because the so-called lease is unauthorized and void, or because the lease, because executed without proper authority, or because the rights of that company are not transferable, or because defendant is not an "assign" within the meaning of the ordinance, that is no fault of the street railway company, or of the city, or, possibly, of the state, and not of the plaintiff. For these reasons the second question in the case must be answered in the negative also.

Under denying new trial affirmed.

NEWELL, J. (*dissenting*).—It seems to me that the maintenance and operation of defendant's railroad constitutes a servitude, additional to, and different from, the use for which the streets were dedicated—in short, a new use of the streets, not contemplated at the time of their dedication. I do not see that this road differs materially from any ordinary "commercial" railroad, except that it occupies the entire length of the street as its depot, at which it takes on and lets off passengers. As operated, it is, to a certain extent, in aid of travel on the street; but this is a secondary and incidental, and not its main and principal, purpose. The doctrine

of the opinion will, it seems to me, lead to the insidious encroachment of any and all railroads upon the public streets, by their simply adopting certain slight and merely colorable changes in their mode of operation. I therefore dissent.

The legislature may authorize a railway to lay its tracks in the streets of a city or it may delegate its power over such use to the municipal corporation; and in the absence of proper authority the use of a street for railway purposes is a nuisance: *Davis v. Mayor*, 14 N. Y. 506; *D. & S. Ry. v. D. C. Ry.*, 2 Col. 673; *M. C. Rd. v. Memphis*, 4 Coldw. (Tenn.) 406; *Harrison v. N. O. P. Ry.*, 34 La. Ann. 462.

The legislature may authorize a railway to use city streets without providing for compensation to the city and without its consent: *People v. Kerr*, 37 Barb. 357; *B. C. & N. Rd. v. C. I. & B. Rd.*, 35 Id. 364; *C. N. & S. W. Rd. v. Newton*, 36 Ia. 299; *Clinton v. C. R. & M. R. Rd.*, 24 Id. 299; *S. & T. Rd. v. Savannah*, 45 Ga. 602.

The decisions of the courts upon the rights of abutting lot-owners to compensation are too numerous and conflicting to be reconciled; yet a few distinctions seem to have been generally recognised.

STEAM RAILWAYS.—1. *Where the fee in the street remains in the abutting lot owner*, it seems to have been generally held that the construction of a steam railway in a street is an additional burden, not contemplated in the original taking, for which the lot-owner is entitled to compensation: *Adams v. H. & D. Rd.*, 18 Minn. 260; *Harrington v. St. P. & C. R. Co.*, 17 Id. 215; *Gray v. St. P. & P. Rd.*, 13 Id. 315; *Schurmeier v. St. P. & P. Rd.*, 10 Id. 82; *Inlay v. U. B. Rd.*, 26 Conn. 249; *G. R. & I. Rd. v. Heisel*, 38 Mich. 62; *Hinchman v. P. H. Rd.*, 17 N. J. Eq. 75; *Wetmore v. Story*, 22 Barb. 414; *Adams v. S. & W. Rd.*, 11 Id. 414; *Stetson v. C. & E. Rd.*, 75 Ill. 74; *I. B. & W. v. Hartley*, 67 Id. 439; *Protzman v. I. & C. Rd.*, 9

Ind. 467; *Kucheman v. C. C. & D. Ry.*, 46 Ia. 366; *Springfield v. C. R. Rd.*, 4 Cush. 63; *Wager v. T. U. Rd.*, 25 N. Y. 526; *Carpenter v. O. & S. Rd.*, 24 Id. 655; *Mahon v. N. Y. C. Rd.*, Id. 658; *Williams v. N. Y. C. Ry.*, 16 Id. 97; *Sherman v. M. L. S. & W. Rd.*, 40 Wis. 645; *Hegar v. C. & N. W. Rd.*, 26 Id. 624; *Pomeroy v. M. & C. Rd.*, 16 Id. 670; *Ford v. C. N. & W. Ry.*, 14 Id. 609.

In *Pres. Soc. v. A. & R. Rd.*, 3 Hill 567, where the legislature had authorized the construction of a steam railway in a street, the fee to which remained in the abutting lot-owners, in delivering the opinion of the court, NELSON, C. J., said: "It is quite clear that the legislature had no power to authorize the company to enter upon and appropriate the land in question for purposes other than those to which it had been originally dedicated in pursuance of the highway act, without first providing a just compensation."

To the same effect is the opinion of Judge REDFIELD: "This is undoubtedly the rule of the English law and of reason and justice, and we should rejoice to see it prevail more extensively in this country. The American courts seem to have been sometimes led astray upon this subject by the fallacy that a railway is merely an improved highway, which for many purposes it is, but not for all any more than a canal:" *Red. on Rys.* (4th ed.) 299 n.

"The travel on them [steam-railways] bears no analogy to our notions of travel on an ordinary street or highway, where every one travels at pleasure in his own conveyance without paying tolls or fares. The uses are totally different and even inconsistent: 1 Dillon Munic. Corp. (3d ed.) 698.

"The constitutional question cannot depend upon the accidental circumstance

at the new road will or will not have an injurious effect; though that circumstance is properly referred to, since it is difficult to perceive how a change of use which may possibly have an injurious effect, not contemplated in the original appropriation, can be considered anything else than the imposition of a new burden upon the owner's estate:" Cooley Const. Lim. 548.

Yet some courts have held that the construction of a steam railway is not an additional burden upon the abutting lot owner's fee in the street entitling him to compensation: *Black v. P. & R. Rd.*, 58 Penn. St. 249; *Snyder v. P. Rd.*, 55 Id. 340; *Case of P. & Trenton Rd.*, 6 Chart. 25; *M. & E. Rd. v. Newark*, 2 Stock. Ch. 352; *L. & O. v. Appelgate*, Dana 289; *Cosby v. O. & R. Rd.* 10 Bush 288.

2. *Where the fee in the street is in the city*, it has generally been held that the abutting lot-owner is not entitled to compensation, unless he has suffered special damage, and a depreciation in the value of the property from the location of the road is not to be considered: *Plant v. L. Rd.*, 10 Barb. 26; *Chapman v. A. & R. Rd.*, Id. 360; *People v. Kerr*, 37 Id. 357; *C. B. & Q. Rd. v. McGinnis*, 9 Ill. 269; *Stone v. F. P. & N. W. Rd.*, 68 Id. 394; *Murphy v. Chicago*, 9 Id. 279; *Moses v. P. F. W. & C. Rd.*, 21 Id. 516; *Hine v. K. & D. M. Rd.*, 42 Id. 636; *Davenport v. Stevenson*, 34 Id. 225; *Cook v. Burlington*, 30 Id. 94; *Milburn v. Cedar Rapids*, 12 Id. 246; *A. & N. Rd. v. Garside*, 10 Kan. 552; *L. & F. Rd. v. Brown*, 8 B. Mon. 763; *Lackland v. N. M. Rd.*, 34 Mo. 259; *Porter v. N. M. Rd.*, 13 Id. 128; *H. & T. Cen. Rd. v. Odum*, 3 Tex. 343.

But for any special damages to buildings, or for obstructions to free access to premises, or from negligent construction or other damages, amounting to more than mere inconvenience, the abutting lot-owner is entitled to recover: *S. C. Rd. v.*

Steiner, 44 Ga. 546; *Rigney v. Chicago*, 102 Ill. 64; *Stone v. F. P. & N. W. Rd.*, 68 Ill. 394; *Cadle v. N. W. Rd.* 44 Ia. 11; *I. C. Rd. v. Boden*, 10 Ind. 96; *Cosby v. O. & R. Rd.*, 10 Bush 288; *B. & M. Rd. v. Reinhackle*, 15 Neb. 279; *Kellinger v. F. S. Rd.*, 50 N. Y. 206; *M. & E. Rd. v. Newark*, 2 Stock. Ch. 352; *Fifth Nat. Bank v. N. Y. E. Rd.*, 24 Fed. Rep. 114. But see *Slatten v. D. M. Rd.*, 29 Ia. 148.

"The owner of a lot fronting on a particular street, has a peculiar interest in that street. His title carries with it as an essential incident, certain valuable and indispensable services and easements in and over that street, which are as inviolable as his property in the lot itself. * * * But his peculiar right does not depend upon or spring out of the ownership of the fee:" *J. M. & I. Rd. v. Esterle*, 13 Bush 667.

3. In *S. P. Rd. v. Reed*, 41 Cal. 256, where the ownership of the fee seems to have received no attention in the opinion of the court, it was held that the lot-owner should be compensated.

Under a clause in the state constitution that "private property shall not be taken or damaged for public or private use without just compensation" it has been held that the lot-owner must be compensated, even though the fee in the street is in the city: *Mollandin v. U. P. Ry.*, 14 Fed. Rep. 394; *Rigney v. Chicago*, 102 Ill. 64.

HORSE RAILWAYS.—The rule obtains very generally that the construction of a horse railway in a city street is a proper use of the street, and that the abutting lot-owner cannot recover compensation therefor, whether he owns the fee in the street or not: *C. St. Ry. v. Covington*, 19 Am. L. Reg. 765; *Elliott v. F. H. & W. Rd.*, 32 Conn. 579; *W. J. Rd. v. C. M. & S. L. Rd.*, 34 N. J. Eq. 164; *Hinchman v. P. H. Rd.*, 17 Id. 75; *G. R. & I. Rd. v. Heisel*, 38 Mich. 62; *Atty.-Gen. v. M. Rd.* 125 Mass. 515;

Hobart v. M. C. Rd., 27 Wis. 194. But in New York the ownership of the fee seems to be regarded as the criterion as to whether the lot-owner can recover compensation or not; *Craig v. R. & B. Rd.*, 39 Barb. 494; *B. C. & N. Rd. v. C. I. & B. Rd.*, 35 Id. 364; *B. C. & J. Rd. v. B. C. Rd.*, 33 Id. 420; *People v. Kerr*, 27 N. Y. 188.

The rule as to special damages would probably be similar to that governing steam railways: *Hobart v. M. C. Rd.*, 27 Wis. 194; *C. & S. G. A. St. Ry. v. Cumminsville*, 14 Ohio St. 523.

If the horse railway company accepts a charter providing for compensation to lot-owners, it is, of course, bound by its acceptance to pay: *People v. Law*, 34 Barb. 494.

STEAM MOTORS.—In *Stanley v. Davenport*, 54 Ia. 468, the court say: "It will be conceded, if no change is made in the grade of the street, the weight of authority seems to be, the city may authorize a horse railway to occupy the same. This doctrine is based on the ground, there is no annoyance from fire, smoke, steam-whistles, or rapid progress, and it does not signify that the street railroad has an exclusive right to use its own track when occasion requires. * * * It does not therefore follow the conceded proposition, that a city may lawfully allow the street to be occupied by a horse railroad, that it may do so where the road is operated by steam power." CHAS. A. ROBBINS.
Lincoln, Neb.

Supreme Court of New Jersey.

STATE ex REL. ATWATER v. DELAWARE, LACKAWANNA AND WESTERN RAILROAD CO.

A railroad company chartered as a common carrier of passengers and freight, is under no obligation to establish commutation rates for a particular locality, *but* when it has established such rates, and commutation tickets are sold thereat to the public, the refusal of such a ticket to a particular individual, under the same circumstances and upon the same conditions as such tickets are sold to the rest of the public, is an unjust discrimination against him, and a violation of the principle of equality which the company is bound to observe in the conduct of its business.

The relator was the holder of a monthly commutation ticket. On one occasion, during the month for which his ticket was issued, he left it at home by inadvertence, and, when on the train, being asked for his ticket and not finding it, he tendered to the conductor a regular trip ticket, provided it should not be punched, and should be returned to him the next morning on presentation of his commutation ticket, and refused otherwise to pay his fare. This request the conductor refused, for the reason that he had no right to permit the relator to ride on a ticket which should not be punched, and the relator remained on the train without paying fare or surrendering the trip ticket and without any disturbance being made. *Held*, that the relator, by such conduct, made himself liable to be ejected from the train, and it may be to the forfeiture of the commutation ticket, he then held, but that such misconduct did not justify the company in refusing to sell the relator commutation tickets thereafter; and that for such wrongful refusal, the relator may have remedy by mandamus.

ON rule to show cause why a mandamus should not issue. The relator, an attorney and counsellor-at-law, practising his profession

the city of New York, resides at East Orange, in this state. He testified that he is permanently residing at that place, having resided there since August 1884, occupying a rented house, the present lease of which expires May 1st, 1886. East Orange is on the line of the Delaware, Lackawanna & Western Railroad, the only railroad between East Orange and New York city. The regular fare between East Orange and New York city is 26 cents for a single ticket, and 50 cents for an excursion ticket. Monthly commutation tickets, such as the company is accustomed to sell to persons who apply for them, are sold at the rate of \$6.50. Until March 1885, the relator was a commuter, purchasing monthly tickets at commutation rates.

On the 28th of February 1885, the relator applied to the company's agent, whose business it was to sell tickets of that class, for a commutation ticket for the ensuing month of March, and tendered the price of the ticket. The agent refused to sell the relator a ticket, and assigned as his reason therefor, that he had received instructions not to sell the relator commutation tickets. The relator, on the 1st of March, applied again for the ticket, and was again refused. The agent testified that in refusing to sell the ticket to the relator, he acted under written instructions to him from the company's passenger agent, of the date of February 7th, 1885, in these words: "If Henry G. Atwater, who now holds commutation ticket No. 27, applies to you for a renewal of his ticket next month, refuse to sell him one. He has violated the rule governing the sale of commutation tickets, and, as these are special tickets, the company has the right to refuse the privilege of buying one to any person who wilfully violates the rules. If Mr. Atwater asks any questions, simply tell him that you are acting under instructions, and refer him to this office, or to Supt. Reasoner." On the day of the first refusal, the relator wrote to the president of the company, stating that a commutation ticket for March had been refused, claiming the right to buy the same on the same terms as other persons, and stating that if it was again refused he would take proceedings to insure his rights and compel the issuance of the ticket. To this no answer was received. The agent testified that the order contained in the instructions of February 7th was never countermanded or withdrawn. Monthly commutation tickets were sold at East Orange, for the month of March 1885, to all persons desiring to purchase, with the exception of the relator. The relator, on the

7th of March 1885, applied for and obtained a rule to show cause why a mandamus should not issue commanding the company "to cease from discrimination against Henry G. Atwater, the relator, and to furnish him with transportation between East Orange and New York upon the same terms which it furnishes the same transportation to other persons, and to issue and deliver to the said relator commutation tickets between said East Orange and New York as often and whenever he shall demand the same, upon the same terms and conditions, and for the same price upon and at which it issues and delivers them to persons in general, other than the relator."

Cornelius S. See, for relator.

J. D. Bedle, contra.

The opinion of the court was delivered by

DEPUE, J.—The Morris & Essex Railroad Company was incorporated in 1835, to construct a railroad for the purpose of carrying passengers and freight. The charter authorized the company to charge for the carriage of passengers and freight, and prescribed the limits of the rates to be charged per ton for the transportation of freight, and per mile for the carriage of passengers: P. L. 1835, p. 29, sect. 10. In virtue of its charter rights and privileges, the company became a common carrier of passengers and freight. By legislative authority, the Delaware, Lackawanna & Western Railroad Company, as lessee of the company's railroad, was invested with its franchises, rights and privileges, subject, of course, to all the obligations and duties resting on the lessor.

At this day it would be superfluous to enter upon a discussion to support the doctrine, so well settled, that common carriers are public agents, transacting their business under an obligation to observe equality towards every member of the community—to serve all persons alike, without giving any unjust or unreasonable advantages, by way of facilities, for the carriage or rates for transporting them: 1 Wood Rys., sect. 195. The leading case on this subject is *Messenger v. Pennsylvania Rd. Co.*, reported, as decided in the Supreme Court, in 36 N. J. Law 407, and in the Court of Errors, in 37 N. J. Law 531. In his opinion, in the Supreme Court, Chief Justice BEASLEY says: "It was one of the primary obligations of the common carrier, to receive and carry all goods offered for transportation, upon receiving a reasonable hire. * * * Thus,

the very foundation and substance, there was inherent a rule which excluded a preference of one consignor of goods over another. * * * Recognising this as the settled doctrine, I do not see how it can be admissible for a common carrier to demand a different rate from various persons for an identical kind of service, under identical conditions. * * * A person having a public duty to discharge is undoubtedly bound to exercise such office for the equal benefit of all, and therefore to permit a common carrier to charge uniform prices, according to the person with whom he deals, for the same services, is to forget that he owes a debt to the community."

On affirmance of this case, the Court of Errors was equally emphatic in affirming the doctrine that a common carrier owes an equal duty to all, which is not discharged, if unequal preferences are made and the enjoyment of the common right is thereby prevented or impaired. How uniformly the doctrine of this case has been adopted and applied, will be seen by the citations and extracts from opinions of the courts of our sister states, given by Mr. Justice ATHERTON, in his opinion, in the recent case of *Schofield v. Lake Shore & M. Ry.*, 3 N. E. Rep. 907. A collection of cases illustrative of the application of the same principle, to railroad, express, telegraph, and water companies, will be found in a note to *B. & O. Tel. Co. v. Bell Telephone Co.*, 24 Amer. Law Reg. (N. S.) 578.

There is also a considerable line of cases holding that the carrier may discriminate in the rates charged for the transportation of different classes of goods, or in favor of persons shipping large quantities of freight, or in favor of the long distances for which freight is carried as against shorter distances, or upon ground which would increase the trouble or cost of carrying for one party as compared with another. Some of these cases were decided on the "equality of use" in the English statutes, which our courts have held to be merely declaratory of the common law.

Others were decided on common-law principles, without any statutory regulations of the subject. An examination of cases of this class will show that the common-law of obligation of common carriers to deal with all persons on an equality, is tacitly, if not expressly, recognised; for such discriminations have been upheld everywhere, under the same circumstances and for the same class of goods, the same rates would be charged to all, or the discrimination, if made under special circumstances, appeared to be just and

reasonable: *Ransome v. Eastern Counties Ry.*, 1 C. B. (N. S.) 437; s. c. 4 C. B. (N. S.) 135; *In re Caterham Ry.*, 1 C. B. (N. S.) 410; *In re Oxlade*, Id. 454; *Baxendale v. Great Western Ry.*, 5 C. B. (N. S.) 309, 336, 354; *Nicholson v. Great Western Ry.*, Id. 366; *Garton v. Great Western Ry.*, Id. 669; *Garton v. Bristol & E. Ry.*, 6 C. B. (N. S.) 639; *Baxendale v. Eastern Counties Ry.*, 4 C. B. (N. S.) 63; *Evershed v. London & N. W. Ry.*, 2 Q. B. Div. 254, 267; *Crouch v. London & N. W. Ry.*, 2 Car. & K. 789-804; 1 Wood Rys., sects. 197, 198; 8 Wood Rys., sect. 496; *Stewart v. Lehigh Valley Ry.*, 38 N. J. Law 505, 520.

And it is indisputable that, where the carrier has a fixed schedule of rates for carriage for the public generally, a demand, from one person, of a higher rate for the same service would be unlawful, although the rate demanded was less than its charter allowed; for such an incorporated company has the double duty to keep within the limit of charges prescribed by its charter, and also to conform to that common-law obligation to observe equality in charges with respect to all, which the law of the land lays upon all the business for which it was incorporated.

The principle above stated is applicable to the case in hand. By virtue of the charter under which the company transacts its business, it is a common carrier of passengers as well as of goods, and in that capacity is obliged to carry all passengers who are ready to pay for their transportation, and liable to an action at the suit of any one whom it refuses to carry without lawful excuse: *Story, Bailm.* p. 591; *Bennett v. Dutton*, 10 N. H. 481; *Jencks v. Coleman*, 2 Sum. 221; *Bennett v. Peninsular & O. S. B. Ry.*, 6 C. B. 775; *Beekman v. Saratoga & S. Rd.*, 3 Paige 45. And as was said by the court in the *Messenger Case*, in virtue of its charter rights and privileges, the company is a public agent, and, as such agent, is placed under a duty to exercise its calling with perfect impartiality towards all persons.

Carrying passengers upon commutation tickets at a less rate than the charges for single tickets has become a usual mode with railroad companies in prosecuting the carrying business. It is a mode of transacting business of substantial benefit to those who are able to avail themselves of the privilege; and, at the same time, is greatly conducive to the growth and prosperity of parts of the state lying adjacent to the large cities. Indeed, a considerable, if not a greater part of the passenger carrying business in localities contiguous to

great business centres of the country, is transacted under this system, and the rental and market value of lands in such localities are largely determined by the ability to procure transportation at reduced commutation rates. The denial of this privilege to a particular individual is to him a substantial injury. A company is under no obligation to establish commutation rates for a particular locality, but when it has established such rates, and commutation tickets are sold thereat to the public, the refusal of such a ticket to a particular individual, under the same circumstances and upon the same conditions as such tickets are sold to the rest of the public, is an unjust discrimination against him and a violation of the principle of equality which the company is bound to observe in the conduct of its business. There is not a perceptible shade of difference between the denial of a commutation ticket, under such circumstances, and the refusal to sell the same individual an ordinary ticket, at the ordinary rate, and demanding of him the utmost price allowed in the company's charter, in excess of the usual price at which such tickets are sold to the public; and such denial cannot be made to square with the principles laid down and emphasized in the *Mesinger Case*.

The excuses the law admits of as sufficient to justify a common carrier in refusing to admit a passenger willing to pay his fare, relate to the character or conditions of the proposed passenger, or the inability of the carrier to carry such person for want of room in the vehicle. For instance, the carrier is not bound to receive vagabonds, thieves or known pickpockets, who seek to board the train to pursue their vocations; persons whose conduct is riotous or disorderly, or one whose person or clothing is so filthy as to be obnoxious to other passengers, or who is afflicted with a contagious disease, or intoxicated to such an extent as to render it probable that he would be disagreeable or annoying to passengers: 2 Wood Rys., sect. 297; *People v. People's R.R. Corp.*, p. 259. The carrier may also exclude a passenger who refuses to comply with the reasonable rules and regulations of the company. In this instance the excuse for refusing to sell the relator a commutation ticket is his refusal to pay his fare on one occasion during the previous month, when, by inadvertence, he had left his commutation ticket at home. The facts of that transaction are these: That on the 6th of February the relator, holding a commutation ticket for the month of February, took passage in the company's cars for New York city; that the baggage-master came

through the cars collecting tickets, and asked the relator for his ticket; that the relator looked for his commutation ticket, and could not find it, and thereupon offered a regular trip ticket, provided it should not be punched, and provided it should be returned to him the next morning, on presentation of his regular commutation ticket, and refused otherwise to pay his fare; that the same offer was made to the conductor and was refused for the reason that the latter had no right to permit the relator to ride on a ticket that should not be punched. The relator rode to Hoboken without paying fare or surrendering his trip ticket, and no disturbance was made.

He knew and should have respected the duties of the employees on the train, in the enforcement of the company's rules. By his conduct he made himself liable to ejection from the train, and it may be to the forfeiture of the commutation ticket he then held. But we think that his misconduct did not justify the company in excluding the relator thereafter from a privilege in which, as a member of the community, he was entitled to participate, in common with others of the public. Such a measure of punitive justice has not been granted by any statute, and if inflicted by any regulation of the company, which it was not, would be an unreasonable exercise of the company's power to make rules and regulations for the government of passengers.

The relator's right to proceed by mandamus is disputed. It is insisted that his only remedy is by action for damages. It is undisputed that mandamus is an appropriate remedy for withholding a right such as the relator has in this instance, and that the court in its discretion will award the writ, if justified by the circumstances: *State v. Railroad Co.*, 37 Conn. 154; *Chicago & N. W. Rd. v. People*, 56 Ill. 365; High, Extr. Rem. § 322. It will be observed that the relator testified that his residence at East Orange is a permanent residence, and that the lease for the house he occupies extends until May 1st next. His business is established in the city of New York. He also testified that the agent's refusal was to sell him any more commutation tickets, and it does not appear that the terms of the agent's instructions by letter of February 7th, were communicated to him. The agent, on his examination as a witness on the 1st day of May 1885, testified that the order so given had not been countermanded or withdrawn, and it is manifest from this litigation that it is intended not to admit the relator's right until a decision upon that right shall be obtained—a circumstance which is

icient evidence of refusal to justify the award of a mandamus :
ate v. Freeholders of Ocean, 47 N. J. Law 417. Furthermore,
 relator applied for and obtained a rule to show cause on the
 of March, and brought on the argument of the rule at the first
 m of this court thereafter. The delay in the decision of the
 e was due to causes for which the relator is in nowise responsi-
 , and action for damages, with the obligation to demand and to
 der the price of a commutation ticket, from month to month, and
 ke a payment of the fares charged under protest every time,
 uld be an inadequate and vexatious means of enforcing the
 ator's rights.

Under the circumstances, we think a peremptory mandamus, in
 conformity with the terms of the rule to show cause, should be
 nted.

n early definition of a common car-
 is "any man undertaking, for hire,
 carry the goods of all persons *indif-*
erently:" *Gisbourn v. Hurst*, 1 Salk.
 A more recent definition is "every
 on who undertakes to carry, for a
 pensation, the goods of all persons
fferently, is, as to the liability imposed,
 be considered a common carrier:"
age Bank v. Brown, 3 Wend. 161.
U. S. Express Co. v. Backman, 28
 o St. 150. It will be observed that
 e definitions involve a serving of the
 ic without discrimination between
 ons, so far as it relates to the carry-
 of "goods;" but, as we shall see,
 same rule is applicable to the carry-
 of persons also; *B. & O. Rd. v.*
ams' Express Co., 18 Am. & Eng.
 Cas. 455.

hus it is said in one case of a rail-
 y company, that it "is bound, as a
 mon carrier, when not over-crowded,
 ke all proper persons who may apply
 transportation over its line, on their
 plying with all reasonable rules of
 company. But it is not bound to
 y all persons at all times, or it might
 utterly unable to protect itself from
 a. It would not be obliged to carry
 whose ostensible business might be
 njure the line : (*Jencks v. Coleman*, 2

Sumn. 221); one fleeing from justice ;
 one going upon the train to assault a
 passenger, commit larceny or robbery, or
 for the purpose of interfering with the
 proper regulations of the company, or
 for gambling in any form, or committing
 any crime ; nor is it bound to carry per-
 sons infected with contagious diseases, to
 the danger of other passengers:" *Thur-*
ston v. Union Pac. Rd., 4 Dill. 321 ; see
Pearson v. Duane, 4 Wall. 605 ; *Bennett*
v. Dutton, 10 N. H. 481. Nor is a car-
 rier bound to carry a drunken person, who
 is in such a condition as to render it rea-
 sonably certain that by act or speech, he
 will become offensive or annoying to
 other passengers, even though he has not
 committed any act of offence or annoy-
 ance : *Vinton v. Middlesex Rd.*, 11
 Allen 304 ; *Pittsburgh, &c., Rd. v. Van-*
dyne, 57 Ind. 576.

So with reference to the transportation
 of goods, the same principles are appli-
 cable in general. A common carrier is
 bound to serve all alike, and carry all
 goods which they carry that are ten-
 dered to them, and which they are able
 to carry : Story on Bailment, sect. 508.

In speaking of the right to compensa-
 tion it was said : "These charges, how-
 ever, must be uniform ; that is, the
 charge should be the same for all persons

similarly situated, and for all freights of a like kind and equality, for a given service. They may divide passengers and freights into classes, with descriptive distinctions, and charge different rates for different classes for a given service, but the charge should be uniform upon all persons and freights embraced within each class :'' *Chicago, &c., Rd. v. Parks*, 18 Ill. 460 ; s. c. 68 Am. Dec. 562. In another case it is said that "transportation by a common carrier is necessarily open to the public upon equal and reasonable terms. An exclusive grant to one is inconsistent with the rights of all others :'' *Audenried v. P. & R. Rd.*, 68 Penn. St. 370 ; s. c. 8 Am. Rep. 195.

This standing indifferent between men and men implies that the price charged for transportation must also be an indifferent price ; in other words, for the same service at the same time and place, under the same conditions, the same price must be charged, and no inequality of price can be insisted upon. This is the current of authority in this country, and it is declared to be the same at common law : *McDuffee v. Portland & Rochester Rd.*, 52 N. H. 430 ; s. c. 13 Am. Rep. 72 ; *Messenger v. Pennsylvania Rd.*, 36 N. J. L. 407 ; s. c. 13 Am. Rep. 457 ; s. c. on appeal, 8 Vroom 531 ; s. c. 18 Am. Rep. 754 ; *New England Express Co. v. Maine Cent. Rd.*, 57 Me. 196 ; s. c. 2 Am. Rep. 31 ; *Sandford v. Railroad Co.*, 24 Penn. St. 378 ; s. c. 1 Am. Ry. Rep. 530.

In this country numerous statutes have been passed, regulating fares and charges, or providing that there shall be no unreasonable discrimination in fares, rates or services between persons. These statutes have been almost universally held to be only declaratory of the common law, and as applying principles well known before their passage : *McDuffee v. Portland & Rochester Rd.*, 52 N. H. 430 ; s. c. 13 Am. Rep. 72.

In England, however, it has been declared in a dictum that at common law,

there was no prohibition against reasonable discrimination : *Laren Eastern Counties Ry.*, 4 C. B. 63 ; but this case has not been followed in this country as an authority. In that country was passed a statute concerning the regulation of railroads, and the companies' charges, in which there was a clause usually known as the "reasonable clause." Under this statute the carrier has the right to make inquiry into the necessity of reasonable discrimination, both in accommodations and price charged, and maximum rates have been rendered conclusive by the statute. But this clause has not been accepted in this country as declaratory of the common law ; and this is manifestly the true exposition of the law of the courts of that country, not finding it necessary to go beyond the words of the statute, on any occasion, fell into the error that there was no power at common law to grant relief for unreasonable discrimination, and came to regard the statute as the only law affording relief. *McDuffee v. Portland & Rochester Rd.*, *supra*.

These English cases may, therefore, be regarded as authorities in this country touching questions of unreasonable discrimination.

The cases are to the point that the price must be no "unreasonable discrimination." But "neither the service nor the price is necessarily unreasonable and unequal in a certain narrow, and literal sense ; but that is not a reasonable service, or a reasonable price, if it is unreasonably unequal. The question is not merely, whether the service is absolutely unequal in the literal sense, but also whether the inequality is unreasonable and injurious." *McDuffee v. Portland & Rochester Rd.* This is quite evident from the facts given in the case just quoted. The charge of ten dollars for carrying a barrel of flour for one merchant from one place to another may be a reasonable rate ; but it is not reasonable to charge another

greater sum for a like barrel of flour of same weight, carried over the same route, at the same time, would be an undiscrimination.

It cannot, it has been said, always be accepted as a criterion that a charge is great or unjust from the fact that another is not charged as much. As was said by Justice CROMPTON to a plaintiff: "In charging another person too little is not charging you too much." *Garton v. B. & E. Rd. Co.*, 1 B. & S. 112. In language used it was assumed that the plaintiff had not paid an unreasonable price, and this conclusion necessarily ended the controversy. Suppose, however, "another person" had been charged all but reasonable price, then any charge to the plaintiff would have been an unreasonable charge. The charging of one too little is only apparent discrimination. "But if an apparent discrimination is found to have been a real one, the question is whether it was reasonable, and if unreasonable, whether the party complaining was wronged by it." *McDuffee v. Portland, Me. Rd. Co.*, *supra*.

On the subject we are discussing is well illustrated by a New Jersey case. The plaintiff sued the Pennsylvania Railroad Company for overcharges, alleging that in 1870 he entered into a contract with the company, to take effect January 1st, 1871, providing to transport hogs from New Jersey and Pittsburgh to Jersey City, at the regular rates, allowing him a drawback of twenty cents per hundred pounds upon all hogs shipped from Chicago, and ten cents per hundred pounds upon all hogs shipped from Pittsburgh; that if the company, after January 1st, 1871, should carry the same description of freight for others, between the same points, except seven named parties, at less than their regular rates, or should allow such others drawback, then it would allow the plaintiff such further drawback as would bring their freights twenty cents per hundred and ten cents per

hundred lower than the lowest. It was averred by the plaintiff that he had shipped twelve millions of pounds from Chicago, and a like amount from Pittsburgh to Jersey City by the defendant's road; that he had paid the regular rates, and had received the twenty cents and ten cents drawback, but the company, during the same year, carried for other persons than those excepted in the contract, allowing such persons the same drawback, or making a reduction in the rates equal to the drawback, whereby the plaintiff became entitled to have a further drawback of twenty cents and ten cents per hundred weight.

The court refused relief, and held the contract void, on the ground that it was "calculated to give an important advantage to one dealer over other dealers, * * * and that if the power to make the present engagement exists, many branches of business are at the mercy of these companies," and therefore created a monopoly, contrary to public policy. It was said: "A merchant who can transport his wares to market at a less cost than his rivals, will soon acquire, by underselling them, a practical monopoly of the business." "A person having a public duty [as a common carrier] to discharge, is undoubtedly bound to exercise such office for the equal benefit of all, and, therefore, to permit the common carrier to charge various prices, according to the person with whom he deals, for the same service, is to forget that he owes a duty to the community. If he exacts different rates for the carriage of goods of the same kind, between the same points, he violates, as plainly, though it may not be in the same degree, the principle of public policy which, in his own dispute, converts his business into a public employment. The law that forbids him to make any discrimination in favor of the goods of A. over the goods of B., when the goods of both are tendered for carriage, must, it seems to me, necessarily forbid any discrimination

with respect to the rate of pay for the carriage. I can see no reason why, under legal rules, perfect equality to all persons should be exacted in the dealings of the common carrier, except with regard to the amount of compensation for his services." Proceeding further, the court touches on the subject of Justice CROMPTON's remark, and says: "The rules that the carrier shall receive all the goods tendered, loses half its value, as a politic regulation, if the cost of transportation can be graduated by special agreement, so as to favor one party at the expense of others. Nor could the defect in the law, if it existed, be remedied by the principle which compels the carrier to take a reasonable hire for his labor, because, if the rate charged by him to one person might be deemed reasonable, by charging a lesser price to another for similar services, he disturbs that equality of right among his employers which it is the endeavor of the law to effect. Indeed, when a charge is made to one person, and a lesser charge for precisely the same offices to another, I think it should be held that the charge is not reasonable; a presumption which would cut up by the roots the present agreement, or, by the operation of this rule, it would be a promise founded on the supposition that some other person is to be charged more than the law warrants:" *Messenger v. The Pennsylvania Rd. Co.*, 7 Vroom 407; s. c. 13 Am. Rep. 457; on appeal affirmed, 8 Vroom 531; s. c. 18 Am. Rep. 754, where it was said: "A want of uniformity in price for the same kind of service under like circumstances is most unreasonable and unjust, when the right to demand it is common. It would be strange if, when the object of the employment is the public benefit, and the law allows no discrimination as to individual customers, but requires all to be accommodated alike as individuals, and for a reasonable rate, that by the indirect means of unequal prices some could get the advantage of the accommodation and others not."

In another New Jersey case it is held that an agreement not to allow others a drawback from established on the transportation of merchandise which is allowed to the shipper, is against public policy and void. But the agreement does not invalidate the entire contract if it is severable. The agreement to allow the drawback to the shipper is valid and enforceable, and other terms are entitled to equally reasonable treatment. *Stewart v. Lehigh Valley Rd. Co.*, 10 N. J. Law 505.

So, where a railroad company grants the right to an express company to use part of its car, and denied the same privileges to an individual, it was held that the discrimination was unreasonable, and an action would lie against the company for damages, even though preference was practised in another case if in violation of the law. *McDuffee v. Portland & Rochester Rd. Co.*, 52 N. H. 430; s. c. 13 Am. Rep. 72; *New England Express Co. v. Central Rd.*, 57 Me. 196; s. c. 13 Am. Rep. 31; 9 Am. L. Reg. 31. *Sandford v. Catawissa, &c., Rd. Co.*, 10 Harris 378. But the authority on this case and many others is somewhat shaken by a recent decision in the Supreme Court of the United States, where it is held that a railway company was not a common carrier of a common carrier, and nor bound to give it the same transportation it was bound to give to an individual. Three cases were decided on this point. Certain express companies had been doing business upon certain roads, under special written contracts, and at the expiration of these contracts they refused to continue the services. The lower courts they were compelled to continue the services by a mandatory injunction: *Dinsmore v. Louisville, &c., Rd. Co.*, 3 Fed. Rep. 593; *Southern Express Co. v. Louisville, &c., Rd. Co.*, 4 Fed. Rep. 481; *Southern Express Co. v. Memphis, &c., Rd.*, 10 Fed. Rep. 210; *Southern Express Co. v. Nashville, &c., Rd.*, 20 Am. L. Reg. 590.

an appeal, this ruling was reversed; and it was held that the railway company could lawfully refuse the express company transportation and assume itself the carrying of express matter. Many cases, therefore, in the federal courts fall by this decision: *Memphis, &c., Rd. v. Southern Express Co.*, 6 Sup. Ct. Rep. 42.

In Pennsylvania, a railroad company refused to provide an express company the usual facilities, and claimed the privilege of carrying express itself. For "packed parcel" it claimed the privilege of charging, at the same rate, as if each smaller parcel had been separately shipped, and demanded from the express company the same rate for transportation over its road as it charged to those for whom it performed the accessory service of collection and delivery by horse-power. The express company, by injunction, sought to compel the railroad company to allow it "express facilities" over the road, and to restrain the making of overcharge in the transportation of its freight. The injunction was refused, principally upon the ground that the railroad company had the right to engage in the express business as accessory to its business of carrying by rail; that it was entitled to a monopoly of goods over its rails; and that the express company were not entitled to special rates and accommodations, such as it demanded. But it was said that the company could not charge for a "packed parcel" the same rate as if each smaller parcel had been separately shipped, nor could it charge the express company for the accessory service of collection and delivery by horse-power: *Camblos v. Phila. & Reading Rd.*, 9 Phila. 411. Dismissed, *Dinsmore v. Phila. & Reading Rd.*, 2 W. N. C. 275. To the same effect is *Sargent v. Boston & Lowell Rd.*, 115 Mass. 416.

In Ohio, the Lake Shore and Michigan Southern Railway Company entered into an agreement with the Standard Oil

Company, on condition that the oil company would not remove its refinery and works from Cleveland (which it was proposing to do, in order to secure a place from which it could market its oil at a less rate of transportation), to carry all the oil shipped to the country through which the railway ran, and beyond its termini, for ten cents a barrel less than the tariff rates established from time to time. A further consideration for entering into the agreement was that the oil company would ship by the railway instead of storing in winter and shipping in summer by water, as it was proposing to do.

With this contract before it, the railway company laid switches and side tracks and expended \$100,000 in preparation for receiving the oil shipped in bulk. The oil company furnished its own tanks, which reduced the cost of shipping and danger from fire. Under this arrangement, the number of barrels of oil shipped increased from 450,000 in 1875 to 742,000 in 1882, when the suit was brought. This arrangement was not exclusive, but was at all times open to others, shipping a like quantity, and furnishing a like service and facilities; nor was it entered into with any intent to injure the complainant; and the latter, by an arrangement with the Standard Oil Company, had shared in these discriminating rates in shipping his oil up to January 1st, 1880. Under this arrangement, the railway company carried nine-tenths of the oil company's oil.

The complainant had \$70,000 invested in a refinery, with a capacity of 150,000 barrels a year. His market was substantially the same as that of the Standard Oil Company; and he was the principal competitor of the oil company. If, therefore, he was compelled to pay ten cents a barrel for the same carrying, he would lose \$15,000 a year; or, in other words, the Standard Oil Company would receive \$15,000 a year more for

the same quantity of oil than the plaintiff. The contention of the latter was, not that he was charged a rate of compensation for transportation unreasonable in itself, but, by charging a lower rate to his more favored competitor, the latter was enabled to, and was, supplying the market at a price with which he could not compete, and thus was driving him out of the market, and destroying the business he had built up.

The action was for an injunction to restrain the railway company from charging to and collecting from the plaintiff rates and amounts in excess of those charged the Standard Oil Company for like goods to the same point, or from discriminating against him in favor of the Standard, either upon its own line, or on through freight over its line and connecting points.

In the lower court the railway company was restrained as prayed, and on appeal this decision was affirmed; and this, too, though the railroad extended through several states. The ground of the decision was that the action of the railway company was an unreasonable discrimination between shippers; and one that was contrary to public policy and void at common law: *Scotfield v. Lake Shore, &c., Ry.*, 3 N. E. R. 907.

It is no uncommon thing for railway companies to seek to avoid the rule requiring no unreasonable discrimination in rates, by charging some more than others, because of terminal facilities. Thus in an Illinois case, a company contracted with certain elevator owners to deliver to them at their elevators and refuse to deliver to others. In order to reach all these elevators the company had to pass over tracks not their own and pay tolls. Having refused to deliver to the owner of an excluded elevator, he applied for a mandamus to compel a delivery of grain to him at his elevator, and it was granted. The ruling of the court was, that although the company was not bound to deliver at elevators; yet having agreed to

do so for some it was compelled to do so for all, without extra charge, or rate if a charge was made: *Ry. v. People ex rel. Hempstead, &c., Ry.*, 365; s. c. 8 Am. Rep. 61; *People v. Railroad Co.*, 49 Id. 33; *Co. v. People*, 67 Id. 11. It is to effect an effort to make a rate for the conveyance of goods which affected a few individuals; and land it has been held that such a rate which affected only one individual is unreasonable: *Crouch v. Lake & W. Rd.*, 78 E. C. L. 254; *Bristol, &c., Rd.*, 95 Id. 64.

Suppose, however, a carrier is to secure goods for transport, and successfully compete with others from a certain point, lowers the rate at that point so that for a short distance over the same route, but not in competition it charges a greater rate per ton. Is this unreasonable discrimination in one sense of the term it is not. At the competing points all shippers are served alike. At the other where no competition exists all shippers are also served alike. It, therefore, not be justly said that there is an unreasonable discrimination; the circumstances all are so: *Ragan v. Aiken*, 9 Lea 61; 10 Am. Rep. 684; 9 Am. & Eng. Railroad Cas. 201; see *Hersh v. N. J. Rd.*, 74 Penn. St. 181; *A. Rd. v. Denver, &c., Rd.*, 101 Penn. St. 1; *Ransome v. Eastern Counties Ry. Co.* (N. S.) 437; *Munhall v. Pennsylvania Rd.*, 92 Penn. St. 1; 10 Am. & Eng. Railroad Cas. 201.

In one case the court went so far as to say that a carrier may charge a long haul than for a short haul where there is competition between the other road: *Ex parte Koonce, &c.*, 58; see *Hays v. People's Co.*, 12 Fed. Rep. 309.

But in Pennsylvania it is held that though a carrier may have special statutes to discriminating

charge between "local" and other rates, yet it cannot make any discrimination on the ground that certain freight can be carried to its final destination by one route after reaching the terminus of the company's road: *Twells v. Pennsylvania Co.*, 3 Am. L. Reg. (N. S.) 728. In the case cited from Tennessee, if a complaining person had shipped goods from the same place the favored one did, there would have been an undue dissimulation. In England a case arose raising this question: *E.* was a carrier at the town of B., where three railways had their stations; with one of the railways, M., a certain brewer in the town, had direct communication by a line which enabled goods to be sent by trains and taken from the trains by railway M. with greater ease and less time than by the way of ordinary carriage. M. charged them nothing for carriage and made a rebate in the charge for conveyance to station conveyance. These persons had no such communication with railway N. W., but it was often convenient for them to send by that railway; the directors of that railway, in order to compete with railway M., allowed these particular brewers the same advantages as by cartage and rebate as railway M. As to all others in the same trade (among the rest), the directors of railway N. W. made the ordinary charge for cartage, and allowed no rebate on the charge for conveyance on the line. This was held to be an inequality and an preference within the meaning of the "equality clause" of the statute. HATHERLEY said that "The charge was the same to all for the same service performed in the same manner, for carrying the goods for the same distance or similar services rendered in every way; it [this] not being a case of wholesale charge compared with a retail charge and the like, which would be a case of circumstances, and has been decided to be an essential differ-

to distinguish the word "tolls," as applicable to railway rates after the goods to be shipped were delivered at the station, and that the "equality" clause only applied to these rates and not to cartage from station to station. Lord BLACKBURN said of this: "I think it is quite clear that when the charge from station to station and a shilling are both together paid, by one person for the whole service performed by the railway company including the cartage, when the amount of the tolls (supposing them to be exclusive of the cartage), and an added shilling are charged to one person, and to another person the same tolls (again treating them as exclusive of the cartage) are charged, and a shilling's worth of cartage is thrown in gratis, and not charged for, the latter person gets his goods carried upon the railway at a cheaper rate. Whether the shilling is part of the "toll" or not I do not care. In that case there is an inequality; there is a difference in the amount charged for carriage upon the railway which is what the legislature intended to prevent:" *London & N. W. Ry. v. Evershed*, House of Lords, 3 Appeal Cases 1029; s. c. 24 Moak 625; same case in 2 Q. B. Div. 254, and in the Court of Appeal, 3 Q. B. Div. 135, decided in the same way. In these cases the plaintiff having for a long time paid the money in ignorance of the discriminating rate, and part of it at the last, under protest, it was held that he was entitled to recover the overcharge in an action for money had and received. In another English case the railway company refused to receive from the plaintiff, a collier, less than fifteen loads at a time, while it received from others a far less number of loads at a time. The refusal of the company had the effect to add much to the cost of the plaintiff's shipping. This was held to be an unreasonable discrimination: *Lancashire, &c., Ry. v. Gidlow*, L. R., 7 H. L. 517 (1875); s. c. 13 Moak 40.

Lord HATHERLEY, in *London & N. W.*

Ry. v. Evershed, *supra*, refers to a case of "wholesale charge" and says the rule governing it, differs from that governing a "retail charge." This rule is that a carrier may discriminate in rates in favor of persons shipping large quantities of freights over those shipping small quantities. In *Scotfield's Case*, in Ohio, already alluded to, the court seems to have disregarded the rule or not followed it; but that was an instance of a discriminating rate between "wholesale" shippers, and not between a "wholesale" and "retail" shipper, although the difference in the amount of the shipments was very great. In the New Hampshire case, already referred to (*McDuffee's Case*), it was intimated that such a difference might not be an unreasonable discrimination; but in another case from the same state, the exact point has been decided. It was said: "The expense of handling, carrying and storing the smaller amount is much greater, *pro rata*, than that of the same operation upon the larger amount in one body, and a discrimination in favor of the larger dealer is not inequality, but reasonable equality:" *Concord, &c., Rd. v. Forsaith*, 59 N. H. 122; s. c. 47 Am. Rep. 181; see *Ransome v. Eastern Counties Ry.*, 1 C. B. (N. S.) 437. The courts, however, are not inclined to permit the carrier to have a separate charge for every one shipping over its route, according to the amount shipped. The tendency is to require them to divide shippers, in their charges, into two classes, wholesale and retail, and allow them to charge separate rates as to each class, but not separate rates for each shipper of any one class. Just where the line to distinguish between a wholesale and retail shipper is to be drawn, is not clear; but it is a matter of practice or custom: *Ransome v. Eastern Counties Ry.*, *supra*.

There is no rule that requires a common carrier to charge the same rate for all classes of goods. He may, for those goods having qualities which affect the

risk and expense of carrying, charge a greater sum than for those of less risk or the expense of carrying so great. In order that the charge be no greater, there must be some difference of service rendered by the carrier in respect of the use of the rails; see *Great Western Ry. v. Sutton*, L. R., 4 H. L. 61; *Edon, &c., Ry. v. Evershed*, 10 Q. B. 366; *Edon v. Great Western Ry.* (N. S.) 366.

In *Scotfield's Case*, from which it is already seen that a threat to change the mode of shipment is not a valid excuse for granting a special privilege, it was held that such action is not in the interest: *Oxley v. Northampton & C. B.* (N. S.) 454. A coal company threatened to stop shipping over the road for the shipping of coal, unless the railroad company granted lower rates than others, and was excused for granting the special rates: *Harris v. C. B. Ry.*, 3 C. B. (N. S.) 69. Special rates be justified in cases where, on an equality with another carrier, on a better natural situation, the carrier may, to save them, or put them on an equality, when they reach a market: *Eastern Counties Ry.*, 1 C. B. (N. S.) 135.

A carrier cannot, by reason of its regular business of carrying goods, grant unreasonable rates to its patrons of business. Thus, a carrier formerly charged a rate of 3s. 6d. per ton for goods conveyed on its line between London and Birmingham. The goods were collected at Birmingham, both by the company and by the consignee, at a charge of 4s. 10d. per ton. The carrier had no power to impose a charge, but raised the charge to 8s. 4d., being the above charges, with an addition for the public that they would not deliver goods free of charge, the object of this arrangement

persons desiring to have their goods conveyed by the carrier to employ it to collect and deliver their goods, and thus secure this business and the profits upon as well as to exclude B. from coming with them in this department of business. The courts held that this was an undue preference in the company in their separate capacity of carrier other than on the lines of railway, and also an undue prejudice to B. The ground of the decision was that where a company carries on some other business, they must, in respect of such business, be taken to be in the position of third parties: *Barzdale v. Great Western Ry.*, 28 L. J. P. 81; s. c. 5 C. B. (N. S.) 336. See *Bazendale v. Southwestern Ry.*, 11 Mich. L. R., 37; *Bazendale v. Great Western Ry.*, 16 C. B. (N. S.) 137; *Phuys Casson Slate Co. v. Testiniog*, 32 L. T. (N. S.) 271.

Where a company conveyed goods from a certain point to another point over its own line and that of another company, at a certain rate, if they were assigned by and to its own agent at these places, but if consigned through any one else it charged a greater rate, it is held to be an unreasonable preference: *Bazendale v. North Devon Ry.*, 5 C. B. (N. S.) 324.

Likewise, if a company carries on a separate business from carrying, and accounts to itself for the value of the services rendered, it must carry at the same rate as it does for outsiders: *Barzdale v. Great Western Ry.*, 28 L. J. P. 81; s. c. 5 C. B. (N. S.) 336. The "equality clause" in the English statute provides that the tolls charged by railway companies for the carriage of goods shall be charged equally to all persons and after the same rates in respect of all goods of the same description, passing only over the same portion of the line of railway," and that no reduction or advance in any such tolls shall be made, either directly or indirectly, in favor of or against any particular per-

son using the railway. A railway company carried coal to a point upon its railway from a group of collieries placed along the line at varying distances from that point, and charged tolls at one rate per ton in respect of such carriage to all the members of the group. In an action for overcharges by the owner of the colliery lying nearest to the point of carriage, it was held that the company had committed a breach of the statute, which applied, notwithstanding that the termini of the transit over the company's line from the group to the point of carriage differed with respect to each colliery: *Manchester, &c., Ry. v. Denaby Main Colliery Co.*, L. R., 13 Q. B. Div. 674; s. c. 18 Am. & Eng. Rd. Cas. 482. See *Lotspeich v. Central Rd.*, 73 Ala. 306; s. c. 18 Am. & Eng. Rd. Cas. 490.

In England a carrier may enter into a contract with an individual which, by reason of the special facilities of that individual, cannot be made by any other person. For instance: A. may be in such a condition that he can enter into a contract with a carrier for the shipment of a million tons annually, at a special low rate, and no other shipper can secure the same terms, for the reason he cannot furnish the same amount: *Evershed v. London & N. W. Ry.*, L. R., 3 Q. B. Div. 135. Nor is it a violation of the law in that country to allow a special rate to those who can furnish at one time a very large amount, or a train load; although no other person can do so: *Nicholson v. Great Western Ry.*, 5 C. B. (N. S.) 366; *Greenop v. Southeastern Ry.*, 20 Sol. Jour. 830. See *Foreman v. Great Eastern Ry.*, 19 Sol. Jour. 774.

It is a common practice for a railroad company to charge those who pay their fare on the train more than those who purchase tickets for the same trips. This cannot be construed as an unreasonable discrimination. It is such a rule or regulation as a company has a right to make, and one which serves all alike who choose

to obey it: *Chicago, &c., Rd. v. Parks*, 18 Ill. 460; 68 Am. Dec. 562; *St. Louis &c., Rd. v. Dalby*, 19 Ill. 353; *Stephen v. Smith*, 29 Vt. 160; *St. Louis, &c., Rd. v. South*, 43 Ill. 176; *Toledo, &c., Ry. v. Wright*, 68 Ind. 586; s. c. 34 Am. Rep. 277; *Crocker v. New London, &c., Rd.*, 24 Conn. 249; *Porter v. New York, &c., Rd.*, 34 Barb. 353; *Bordeaux v. Erie Rd.*, 8 Hun 579; *State v. Chovin*, 7 Ia. 204; *Du Laurens v. St. Paul, &c., Rd.*, 15 Minn. 49; *Indianapolis, &c., Rd. v. Rinard*, 46 Ind. 293; *Jeffersonville, &c., Rd. v. Rogers*, 38 Id. 116; s. c. 28 Id. 1; *Hilliard v. Goold*, 34 N. H. 230; *State v. Goold*, 53 Me. 279.

The requirement that there must be no unreasonable discrimination between passengers does not prevent a carrier carrying persons or property through charity free of charge. "A person who is a common carrier may devote to the needy, in any necessary form of relief, all the reasonable profits of his business. He has the same right that any one else has to give money or goods or transportation to the poor. But it is neither his legal duty to be charitable at his own expense, nor his legal right to be charitable at the expense of those whose servant he is. If his reasonable compensation for certain carriage is \$100, and his just profit, not needed in his business, is one-tenth of that sum, he has \$10 which he may legally use for feeding the hungry, clothing the naked, or carrying those in poverty, to whom transportation is one of the necessities of life, and who suffer for lack of it. But if he charges the \$10 to those who pay him for their transportation, if he charges them \$10 for \$100 worth of service, he is not benevolent himself, but he is undertaking to compel those to be benevolent who are entitled to his service; he is violating the common right of reasonable terms, which cannot be evaded by compulsory contributions for any charitable purpose. So if he carries one or many for half the reasonable price, and re-im-

burse himself by charging others more than the reasonable price, he is administering, not his own, but the people's charity. And when he seeks to justify an instance of apparent discrimination on the ground of charity, it is necessary to ascertain whose charity was dispensed—whether it was one forced by him from others, or one in the party complaining of it:" *M. v. Portland, &c., Rd.*, 52 N. H. 130; 13 Am. Rep. 72.

Money paid under protest for excessive charges, or ignorantly, may be recovered back. To this there is no dissent: *W. Va. Trans. Sweetzer*, 25 W. Va. 134; *Waterbury v. Chicago, &c., Ry.*, 61 Wis. 464; 50 Am. Rep. 145; *London, &c., Ry. v. Ererashed, supra*; *Peters v. R.*, 42 Ohio St. 275; s. c. 51 Am. Rep. 814. Nearly all the cases hold that it is a question of law upon the facts, whether the charge is an unreasonable discriminating one; but in Texas it is held to be a question of law and not of fact, whether it is unjust: *Houston, &c., Ry. v. Rust*, 58 Tex. 98; s. c. 9 Tex. Eng. Rd. Cas. 123.

But the authorities we have been citing are not always followed. In Florida, it is held that a common carrier is bound to carry for a reasonable compensation, but is not bound to carry for the same price for all. It was held that where fifty cents more per thousand for transporting lumber was charged a plaintiff by a railroad company, than was charged another party for the same service. Suit was brought to recover the difference, and it was held that the plaintiff was not entitled to recover: *J. v. Pensacola, &c., Rd.*, 16 Fla. 62; 20 Am. Rep. 731; see *Eclipse Boat Co. v. Pontchartrain Rd.*, 30 La. Ann. 1. In South Carolina the same conclusion was reached upon a case exactly like the New Jersey rebate case, and a recovery allowed for refusal to repay the rebate. This case

parallel with *Stewart v. Lehigh Ry. Rd.*, 38 N. J. Law 505 ; where a rate was also allowed ; but the two proceeded in directions diametrically opposite ; one that it is a valid contract in all instances, the other that it operates in favor of the carrier in all instances, lowering of rates to all customers, or that reason is valid : *Ex parte* *W. & A. R. R.*, 18 S. C. 38 ; s. c. 44 Am. Rep.

In 1859, a case arose in Massachusetts concerning discriminating rates, in which the court held that a common carrier is not to transport goods for all persons at the same rates ; but may give special rates to whomsoever it will, so long as it does not favor its other customers, under exactly the same circumstances, are charged a reasonable rate : *Fitchburg Rd. v. Gage*, 12 Mass. 393.

A study of the various cases necessarily shows much discrepancy in them. The remark of Justice CROMPTON, while cited, is not followed in principle in many cases. While it is conceded that a carrier may charge a reasonable price, it is often said that the charging of a special rate is not the charging of another rate, but only evidence of it ; yet the courts are very much inclined, where rates are equal, to require the carrier to carry for all at the lowest rate he charges any one customer ; and if he charges a greater rate, to compel him to do so. This is particularly true of the New Jersey cases. So, in many English cases it is said that the interests of the carrier must always be

considered in determining whether it has discriminated in favor of one to the injury of another ; and three cases are cited in this country upon this point ; but it must be obvious that this is true only in a limited sense. For a carrier may be charging all customers such a rate that he is only making a fair profit on the capital invested, and also charge a single customer, in order to favor him, a lower rate, or the cost of the transportation alone, or even below that, whereby the latter is peculiarly favored and enriched by being able to monopolize the trade, at the expense of his competitors in trade. In such an instance, to require the carrier to charge the favored customer the regular rates is obviously beyond the power of a court of chancery ; and to compel it to carry for all at this favored rate is ruinous to it, and violative of the statement that the interests of the road must be always borne in mind. The real solution of this question, if the courts undertake at all to interfere, is, to compel the carrier to carry for all, at the same rate it carries for the favored customer ; and if that is ruinous, the managers of the carrier company have only themselves to blame for having shown and given unfair rates to a customer. One price to all must be the motto, everything else equal ; or, in other words, the *same profit* for the labor performed, must be made out of the carrying done for each individual.

W. W. THORNTON.

Crawfordsville, Ind.

Court of Chancery of New Jersey.

SEMON v. TERHUNE.

A mortgage recorded after the deed to the mortgagor, although it is dated before notice to a subsequent purchaser from the mortgagor. The date may be due to mistake, and the record is enough to put a prudent man on inquiry. The mortgagor who pays the bond after the property has been sold under foreclosure and the proceeds of the land have become the primary fund for the payment, is not to subrogate, and the mortgage is not extinguished by the payment.

FINAL hearing on bill to foreclose and answer.

E. A. & W. T. Day, for complainant.

J. Garrick, for defendant.

The opinion of the court was delivered by

RUNYON, C.—This suit is brought to foreclose a mortgage and acknowledged September 17th 1880, and recorded 15th of October following, given by the defendants John and wife to Richard M. Johnson, upon lands in Johnson to secure the payment of \$750, and interest, according to condition of Semon's bond to Johnson. The bill states that mortgage was given for purchase-money on the sale of the premises by Johnson to Semon, but the fact is not admitted in answer. The deed to Semon was dated September 30th 1880, acknowledged October 1st 1880, and recorded on November following. The bill states that while the mortgage is prior to that of the deed, the mortgage was not delivered until the time of the delivery of the deed; but this is not admitted by the answer. Johnson assigned the mortgage to James M. Connor, by assignment of record, dated 9th 1881, to James M. Connor, by assignment of record, dated February 16th 1881. On the 2d of June 1881, James M. Connor assigned it to James P. Connor, executor, of the estate of C. Connor, deceased, and he assigned it September 4th 1881 to the complainant. When John G. Semon bought the property it was incumbered by a mortgage for \$1000, given to him 10th 1886, by William Nattrass, who then owned the premises. Jane C. Vreeland. That mortgage came to the hands of John G. Terhune by assignment. He died June 15th 1882. His heirs were the defendant John V. H. Terhune and Peter S. Terhune. On September 27th 1882, they filed a bill in this court to foreclose the mortgage. The only defendants to that suit were John G. Terhune and his wife. There was a final decree in that suit by the court, entered February 5th 1883, and the execution thereon for the sale of mortgaged premises, which was sold May 3d 1883, to John V. H. Terhune for \$500, and the deed therefor was given to him by the sheriff. He took possession of his deed, and has been in possession ever since. The bill asks an account be had with him, and that the property be sold in the first place to him the amount which may be found due to him in respect of the first mortgage, and then to pay

complainant what may be found to be due to him on his mortgage, with its proceeds, and that any balance of the proceeds of the sale be paid to Terhune. Terhune, by the answer, admits the making and recording of the complainant's mortgage, and states that the omission to make the holder thereof a party to the foreclosure suit upon the first mortgage was due to the fact that the record of the complainant's mortgage was indexed in a wrong place. The answer further alleges that in 1884 the then holder of the complainant's mortgage threatened to sue John G. Semon for the money due upon the bond, and that the latter then paid it, and took an assignment of the bond and mortgage to complainant, who has no interest in them, but lends them for the use and benefit of John G. Semon, and subject to his control. The complainant filed no replication, and the cause came on for hearing upon bill and answers.

The foreclosure proceedings upon the first mortgage were a nullity as to the holders of the second mortgage. By his purchase at the sheriff's sale under them, Terhune obtained the title of the holders of the first mortgage, and the equity of redemption of John G. Semon and his wife, but that equity of redemption was subject to the payment of the second mortgage, if that mortgage was a valid lien, of which the purchaser at the sheriff's sale had notice, upon the property; and if that mortgage were such a lien, and Terhune had taken an assignment of it after his purchase, equity would not have permitted him to enforce payment from Semon of the bond which it was given to secure, without giving Semon the benefit of a lien on the proceeds of the sale of the premises after satisfying the first mortgage therefrom: *Vanderkemp v. Shelton*, 11 Paige 28. The only question on this point in this case is whether the purchaser had notice; that is, whether he had constructive notice from the records. Had he consulted the record (the index is no part of it), he would have discovered that the title to the mortgaged premises remained in Richard M. Johnson up to September 30th 1880, and that, by a deed of that date, Johnson conveyed them to John G. Semon, who, by a mortgage recorded after, although dated before that date, mortgaged them to Johnson. The fact that the mortgage bears date prior to the date of the deed would not, under the circumstances, have justified the purchaser in concluding that it was given before Semon acquired title, for it might have been due to a mistake in the date of the one instrument or the other. There was at least enough upon the record to put him as a prudent man upon

inquiry. He had notice of the mortgage from the record, and in searching for mortgages by Semon from the date of his title, in September 30th 1880, he would have found the mortgage. The doctrine of the cases of *Losey v. Simpson*, 11 N. J. E. 241; *Speilman v. Kleist*, 36 Id. 199, is not at variance with the rule here enunciated. The doctrine of those cases is that one who takes notice to purchase land, or to take a mortgage upon it, is not bound to take notice of the record of a conveyance or mortgage made by the grantor whose title deed has not been recorded, and the reason is that the searcher has no clue to guide him in searching the record. In this case the record showed the searcher the deed to Semon, and his title was derived from his grantor. The mortgage was indeed dated before the deed, but it was recorded after the latter date, and the mortgage itself was on record. It is urged that, according to the record, it appears that after Semon gave the mortgage to Johnson, Johnson conveyed the property to him by deed of a subsequent date, which deed extinguished the mortgage; for, according to the dates of the conveyances, Semon had no title when he mortgaged to Johnson. But, having no title, he mortgaged the property to the person who had no title. The inference from the condition of the record would be that there was some mistake in the dates, and that in fact Johnson conveyed to Semon and then Semon mortgaged to him; or that Johnson mortgaged to Johnson before he acquired title, and, having no title, afterwards might be estopped from denying that the mortgage was valid. The record was notice of the mortgage. But it is urged that if Terhune is chargeable with notice, Semon is entitled to a decree of relief, because, according to the answer which is to be taken, it appears that upon this hearing, he himself paid off the bond, the property was sold, and the mortgage which the mortgage was given to secure, and the bond was paid off. But if the land had, as between him and the purchaser a mortgage, become the primary fund for the payment of the mortgage, he is entitled to subrogation on paying it off (as he was compelled to do), because of his personal liability thereon. The mortgage of the premises beyond what was necessary to pay the first mortgage was the primary fund to pay the second mortgage (*Vanderbilt v. Shelton*, *ubi supra*), and, under the circumstances, he is entitled to subrogation: *Stillman's Ex'rs. v. Stillman*, 21 N. J. E. 241; *Faulks v. Dimock*, 27 Id. 65; *Tice v. Annin*, 2 Johns. 400; *Jumel v. Jumel*, 7 Paige 591; *Russell v. Allen*, 10 Id.

There will be a decree for an account by Terhune of

and profits from the time of the delivery of the sheriff's deed to him, which account he is to be allowed for lawful taxes and assessments paid by him, and for moneys paid for necessary repairs. Should there be a balance against him on such accounting, it is to be credited on the amount due upon the first mortgage. Should the balance be in his favor, he is to have it as well as the amount due to him in respect to the first mortgage raised and paid to him out of the proceeds of the sale of the mortgaged premises before paying the second mortgage therefrom. There will also be an account of what is due upon the first and second mortgages, and the property will be sold to raise and pay in the first place to Terhune, the amount found to be due upon the first mortgage, after crediting any balance of rents and profits which may be found against him; and if any balance is found in his favor, he is to have the amount paid to him, as before stated, out of the proceeds of sale before payment of the second mortgage. He is not to have the costs of the foreclosure proceedings upon the first mortgage, nor the execution costs in that case; *Van Duyne v. Shann*, 39 N. J. Eq. 6. There will then be paid to the complainant the amount found due upon the second mortgage, with the cost of this suit, and the surplus, if any, will be paid to Terhune.

The right of subrogation is a creation of equity, and has no application to an action at law, as in ejectment: *Meyer v. Montoye*, 106 Ill. 414. It is not formal or technical, but its object is essentially to promote justice. It cannot be invoked if inequitable to do so, or if there is unreasonable delay: *Gerrish v. Agg*, 55 Vt. 329. In its early history it was applied only in favor of those who were bound by the original security with the principal debtor. As equitable rights developed, its application has been greatly extended, and, it may be stated generally, that it is now applied in favor of all persons who are required to pay the debt of another, for the protection of their own interests.

The most common instance, where the doctrine of subrogation is applied, is in the case of purchasers of the equity of redemption, with or without notice of existing liens. Thus, when a purchaser of land pays off a debt of his grantor

secured by a deed of trust upon the premises as a part of the purchase-money, to protect his own property from sale, he will be subrogated to the lien of the deed of trust, as against an intervening lien of the grantor. Here the payment is not voluntary, as if made by a stranger, but is made by the purchaser to protect his own interest in the property. And in such case, a court of equity will keep alive the lien in his favor, notwithstanding it has been formally released without his knowledge and consent: *Hudson v. Dismukes*, 77 Va. 242, 247; *Gatewood v. Gatewood*, 75 Id. 407 and cases; *Young v. Morgan*, 89 Ill. 199, 203. See *Lynch v. Hancock*, 14 S. C. 66, 84; *McCormick v. Irwin*, 35 Penn. St. 111, 117; *Clark v. Mackin*, 95 N. Y. 346; s. c. 30 Hun (N. Y.) 411; *Barnes v. Mott*, 64 N. Y. 397; *Orrick v. Durham*, 89 Mo. 174, 179; *Bryson v. Close*, 60 Ia. 357.

A party who advances money to another that is used to discharge a valid pre-existing lien on real estate, if not a mere volunteer, is entitled, by subrogation, to all remedies which the original lienholder possessed as against the property : *Edwards v. Davenport*, 20 Fed. Rep. 756, 726. In *Cottrell's Appeal*, 23 Penn. St. 294, 295, A. obtained judgment against B. To prevent sale upon execution, B. gave A. his note, with C. as security ; C. paid the note and obtained an assignment of the judgment from A., and claimed payment out of proceeds of sale of B.'s real estate upon judgment obtained by D. against B. subsequently to A.'s judgment : *Held*, that he was entitled to subrogation. The court stated the doctrine thus : "When one not a mere volunteer discharges the debt of another, he is entitled to all the remedies which the creditor possessed against the debtor. Actual payment discharges a judgment or other encumbrance at law, but where justice requires it we keep it afoot in equity for the safety of the paying securities."

In *Mosier's Appeal*, 56 Penn. St. 76, 80, numerous judgments were entered against two debtors, some joint and some several ; executions were issued and the land held jointly levied on. The court ordered the undivided interest of one of the debtors to be sold separately. A junior judgment creditor, believing that the land would be sacrificed, after the execution plaintiffs had refused to assign their judgments to him on payment, paid the executions to the sheriff and satisfaction was entered. No other liens having intervened, he was subrogated to the rights of the execution plaintiffs, and the satisfaction cancelled. The court very clearly states the rule that subrogation "will not arise in favor of a stranger, but only in favor of a party who on some sort of compulsion discharges a demand against a common debtor. For instance, a surety who pays the debt of his principal, will be entitled to the security of the

creditor ; so, where one co-surety has paid the whole debt, he will be entitled to the judgment against the contribution by his co-sureties. The principles of subrogation will apply in favor of a volunteer, but they can only obtain the right of subrogation only by contract. * * * The doctrine as applicable in cases where payment has been made by a volunteer and fair effort to protect the interests of the parties has been made when intervening rights are not jeopardized or defeated."

Stranger cannot invoke subrogation.—Courts uniformly hold the rule that a mere stranger who, in the absence of a contract, pays a debt for which another was liable, which he was under no obligation to pay, cannot invoke the doctrine of subrogation : *Hough v. Aetna*, 57 Ill. 319 ; *Conrad v. E. & C.*, 396, 408 ; *Dixon on Subrogation*, 164, *et seq.* Thus, where a stranger advances money to another to enable him to make a loan to a third party, the security of an equitable mortgage is not entitled to subrogation on the ground that he so advanced the money. *Van Winkle v. Williams*, 105. Or where a third party, under legal obligations, furnishes money to another to redeem from a mortgage where the advancement was made under the belief or expectation that it would succeed to the right of the lender to whom it was so advanced, a belief that a mortgage would be executed to secure him, and for that effect, the principles of subrogation will not apply. The doctrine is considered as an intermediate doctrine. *Waterloo Agr. Works*, 61.

In *Kitchell v. Mudge*, 85, 86, a third party paid the first two of three mortgages on certain real estate, and was subrogated to the amount of the first mortgage under no obligations to pay the second or third.

It was held that his mortgage was subsequent to the one left unpaid, and he was not entitled to be subrogated to the rights of the first two mortgagees.

Conventional subrogation arises by contract in favor of third persons, not parties to the original obligation; as where one lends money with an agreement that it shall be used in discharging a debt due on the purchase of land, and it is so used, with an understanding that he who advances it shall have the same remedies to recover the money thus loaned that the original vendor was entitled to for enforcement of his demand, and the lender is subrogated to the rights of the vendor of the land: *Warhumd v. Merrett*, 60 Tex. 24, 27; see *Baldwin v. Seward*, 94 N. Y. 82; *Seward v. Huntington*, 94 Id. 104.

In *Shinn v. Budd*, 14 N. J. Eq. 234, a third party paid off a mortgage on certain real estate and claimed subrogation. He was under no obligations to make the payment, and it was made without agreement or understanding that he was to be subrogated. His bill was denied. GREEN, Chancellor, observed (p. 236), "Subrogation as a matter of right as it exists in the civil law, from which the term has been borrowed and adopted in our own, never applied to aid a mere volunteer. Legal subrogation into the rights of a creditor for the benefit of a third person, takes place only for his benefit, who being himself a creditor, satisfies the lien of a creditor, or for the benefit of a purchaser who extinguishes the incumbrance on the estate, or of a co-obligor or surety who discharges the debt or of a heir who pays the debts of the succession," citing Code Napoleon, book 3, art. 1251; Civil Code of La., art. 337; 1 Pothier on Oblig., part 3, ch. art. 6, § 6. "We are ignorant, says the Supreme Court of Louisiana, of any law which gives to the party who furnishes money for the payment of a debt the right of the creditor who is thus paid; the legal claim alone belongs not to all

who pay a debt, but only to him, who, being bound for it, discharges it: *Nolte & Co. v. Their Creditors*, 7 Mar. (N. S.) 602; *Curtis v. Kitchen*, 8 Id. 706; *Cox v. Baldwin*, 1 Miller, St. Louis R. 147. The principles of legal subrogation as adapted to and applied in our system of equity, has, it is believed, been rigidly restrained within these limits."

In *The Bank of the U. S. v. Winston's Executors*, 2 Brocken. Rep. 254, C. J. MARSHALL said: "If a security not assignable be discharged by a surety, whom it binds, equity keeps it in force in his favor and puts such surety in place of the original creditor. But I think there is no case in which this has been done in favor of a person, not bound by the original security, who discharges the debt as a volunteer."

In *Gadsden v. Brown*, 1 Speer's Eq. 37 (S. C.), JOHNSON, Chancellor, said: "The doctrine of subrogation is a pure unmixed equity, and from its very nature could not have been intended for the relief of those who were in a condition and at liberty to elect whether they would or would not be bound, and so far as I have been able to learn its history, it never has been so applied. It has been directed exclusively to the relief of those who were already bound, and who could not but choose to abide the penalty. I have seen no case in which a stranger who was in a condition to make terms for himself, and demand any security he might require, has been protected by the principle."

In *Sanford v. McLean*, 3 Paige Ch. (N. Y.) 122, Chancellor WALWORTH states the principle with great clearness: "It is only in cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, or is compelled to pay it to protect his own rights, that a court of equity substitutes him in the place of the creditor as a matter of course without any agreement to that effect. In other cases the demand of a creditor, which is paid with

the money of a third person, and without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, is absolutely extinguished:" see *In re Schaller*, 10 Daly (N. Y.) 57; *Clark v. Moore*, 76 Va. 262.

In *Childress v. Allen*, 3 La. R. 477, it is held that the purchaser of land seized and exposed to sale on an execution issued upon a judgment by which the debt is discharged, is not entitled to be subrogated to the rights of the judgment creditor. Such an act, said the court, cannot be distinguished from payment made to the creditors without a sale of the debtor's property, by a person not having an interest to discharge the debt. Subrogation does not arise in favor of a purchaser on a forced sale.

In the recent case of *Nash v. Taylor*, 83 Ind. 347, 351, an assessment was levied upon certain land for street improvements in favor of the contractor, who did the work on the street. The owner of the land borrowed the money from Nash with which to discharge the

lien, which attached to his of the levy. The money this purpose; Nash sought to the rights of which was denied. The "Here there is nothing loan of money by one nei of blood nor of contract the person who claims t is sought to be displaced There was no colorable ob part of Nash to pay the ment, nor did he do so; intend to pay it. The cas easily discriminated from party discharges a lien un obligation, or pays it, expect some benefit from it."

Railroad v. Fucney, 78 U. v. *Receiver of Green Bay* Biss. C. C. R. 151; *Du Railroad*, 2 Wood C. C. St. Louis H. & K. Rd., 521; *Binford v. Adams*, (S. C. Ind.) 753.

B. San Francisco, Cal.

Court of Errors and Appeals of Maryland.

PROVIDENCE WASHINGTON INS. CO. v. ADLE

In marine insurance, if an article is injured by reason of its own incli- cies; as, for example, by spontaneous combustion, and these tendencies called into activity by any perils insured against, the insurer is not lia-

Whether the same rule applies in an ordinary contract of fire insur-

APPEAL from Superior Court, Baltimore city.

John R. Kenly, for appellant.

F. P. Clark, for appellee.

The opinion of the court was delivered by

STONE, J.—The plaintiffs shipped, by a line of steam from New York to the south, a quantity of oil-cloth Louisiana and Texas. They insured this clothing, before in the office of the defendant company. The clothing in boxes, and on its arrival at its destination it was found and comparatively worthless, either by spontaneous com-

57nd
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some chemical action arising from the materials in the goods themselves. They all presented the appearance of having been heated or charred within the boxes. The clothing was not injured by any external force or accident, but whatever the injury was it was the result of the inherent infirmity of the goods themselves. Neither the plaintiffs nor defendants knew, at the time the insurance was effected, that the goods were liable to spontaneous combustion, and that they would be injured by any inherent defect in the goods. No extra premium was paid to cover such risk. Under these circumstances the defendants claim that, by the general principles of insurance, they are not liable for a loss by spontaneous combustion caused by the inherent infirmity of the goods themselves.

This was a marine policy, and one of the dangers insured against, by the terms of the policy, was fire. But while this is undoubtedly the question remains, and is still undecided in this state, whether the term "fire," used in ordinary marine policy, will, upon general principles, cover the case of spontaneous combustion caused by an inherent infirmity in the article insured, and not the result of accident or peril of the sea. There is no doubt of the liability of the defendant company, under its policy, had the ship taken fire, and the goods have been consumed, or had the fire originated from any of the perils insured against; but the question is a very different one when, as in this case, the goods are in good faith insured, and are covered both by plaintiffs and defendant not to be liable to spontaneous combustion by reason of their inherent infirmity, but which goods were so liable, and were so injured. The authorities are divided upon this subject, and neither full nor satisfactory. One of the authorities to which we have access is Emerigon, who says (page 290): "Article 12 of another title establishes, as a general rule, that nothing which happens through the *inherent vice of the thing*, or the act of the owners, master, or merchant shipper, shall not be reputed a peril, if not otherwise borne on the policy. It is, then, certain that the insurers never answer for damages and losses which arise directly through the act or fault of the assured himself. It would be in fact intolerable that the assured should be indemnified by others for a loss of which he is the author. This rule is grounded on first principles. It is a general rule, from which it is not permitted to derogate by a contrary agreement. As Pothier remarks, 'evident that I cannot validly agree with any one that he shall exempt himself with the faults that I shall commit.'"

We do not understand this learned author to mean that an article which may not be insured that is inherently liable to spontaneous combustion or decay, *provided it is so expressed in the policy*, but otherwise. But if the loss happens through *the fault of the assured*, then the insurers are not liable, whatever may be the terms of the policy. For example, if an article is insured which, when *dry*, is not liable to spontaneous combustion, but when he puts it *on board it is wet*, in such case no recovery can be had. Such is the understanding to be the views of this author.

The next case to which we are referred, is the case of *Boyd v. Dubois*, 3 Camp. 133. In that case Lord ELLENBOROUGH said: "If the hemp was put on board in a state liable to effervesce, and it did effervesce, and generate the fire which consumed it, upon the common principles of insurance law the assured cannot recover for a loss which he himself has occasioned."

The defendant in that case attempted to prove that the hemp which was insured, was put aboard ship in a *damaged* condition, and for that reason was apt to ferment and take fire. This could not be proved in accord with Emerigon.

The next authority, Parsons, in his work on Contracts (vol. 1, p. 374, sect. 6), says: "It is another rule that insurers are not liable for property destroyed by the effect of its own *inherent vici- ciencies or tendencies*, unless these tendencies are made active by a destructive by a peril insured against. Thus, if hemp which is *dry* when laden be afterwards wet by a peril of the sea, and the reason of such wet ferments or rots or burns, the insurers are not to be liable."

And that very learned author refers to both Emerigon and the case of *Boyd v. Dubois* as his authorities.

Chancellor KENT also takes a similar view in his Commentaries (3 Kent, chap. 48. Phillips on Insurance (chap. 13, marginal note) says: "It is a general rule that insurers are not, under the common form of the policy, liable to any damage or loss arising from the qualities or defects of the subject insured, since these are not among the perils assumed by the underwriters."

Parsons on the Law of Marine Insurance (vol. 2, p. 216), takes the same view. He says: "It is also a rule that the insurers are not liable for no subject-matter of insurance which is destroyed by reason of its own inherent defects or tendencies. But this rule does not apply to tendencies which are called into activity only by a

ured against. Thus, if hemp insured burns up or rots from spontaneous ignition or fermentation, it being known that this may happen if the hemp be damp, but not if it be dry, the question would be whether it was damp or dry when it was put on board. But if the hemp were dry when laden, and was afterwards wet by reason of the straining of the ship in a storm, or by the shipping of a sea, of any like peril, then the insurers, whether on ship or cargo, would be liable."

All these authorities refer to *Emerigon* and the case in 3 Camp., and are all upon marine insurance.

On the other hand, we have been referred to the case of *British American Ins. Co. v. Joseph*, 9 L. C. 448 (decided in the Court of Appeals for Lower Canada), which has been supposed to decide that fire insurance (not marine) covers the risk of spontaneous combustion; and, citing that case only, Mr. May, in his work on Fire Insurance, comes to the same conclusion. The Lower Canada case is certainly very imperfectly reported. The report is in French, and the court gave no opinion. The terms of the policy are not set out, and but a very few of the facts in the case. It is by no means clear, from the few facts that are stated, that the spontaneous combustion did not originate in a heap of *uninsured* coal, and extend from that to the insured coal. But suppose the case has all the facts claimed for it by the appellee, and does decide that in a purely fire insurance, the risk of spontaneous combustion is covered, we could not agree that it should overrule the long list of high authorities to the contrary in marine policies; more especially since the reasons to the contrary, we think, are satisfactory. No well-managed insurance company would take a marine risk on an article inherently liable to spontaneous combustion; nor would any prudent shipmaster or owner receive such on his vessel, as not merely the property so insured, but the property of others, and the safety of the ship, and the lives of the crew, would be endangered by so doing. It would, as *Emerigon* says, be intolerable that the owner could receive pay for goods that destroyed themselves. The object of a marine policy is to insure against the perils of the sea, and not against the perils incident to the goods themselves.

In this case it is very clear that the goods were injured by their own inherent infirmity, and that such inherent infirmity was not called into activity by any peril insured against. We think such loss was not within the contemplation of either party to the con-

tract of insurance; that the term "fire," used in the included fire from accident, or brought about by a peril of the and not spontaneous combustion. Entertaining these views, the court below were in error in granting the fourth prayer of the plaintiff, and in refusing the first prayer of the defendant, a judgment must be reversed. But, inasmuch as the evidence is clear and explicit that the injury was caused by the inherent defect of the goods, a new trial will not be awarded.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹

COURT OF ERRORS AND APPEALS OF MARYLAND.²

SUPREME COURT OF NEW HAMPSHIRE.³

SUPREME COURT OF NORTH CAROLINA.⁴

SUPREME COURT OF OHIO.⁵

ASSIGNMENT.

Power to make—Surviving Partner of Insolvent Firm—Estate—Fraudulent Omission from Schedule.—In the absence of any law forbidding it, a sole surviving partner of an insolvent firm, who himself insolvent, can make a valid assignment of partnership assets for the benefit of the joint creditors, with preference to some of them; and the fact that such surviving partner fraudulently omitted from the assignment schedule certain property which constituted a part of the partnership assets and appropriated the same to his own use, while the assignment purported to be of all the firm assets, does not affect the right of the assignee and of the beneficiaries of the trust, they being ignorant of the fraud of the grantor: *Emerson v. Senter*, S. C. U. S., Oct. 1885.

COMMON CARRIER. See *Damages*.

CONFLICT OF LAWS

Contract—Usury.—If no place is agreed on for the performance of a contract, the *lex loci contractus* governs. If the place of performance is agreed on, the *lex loci solutionis* governs: *Morris v. Hockaday*, N. C.

Where a bond was dated in North Carolina, but had no specified place of payment, it was held that it was governed by the usury laws of the state, and it is immaterial that the pleadings admit that the bond was delivered in Virginia: *Id.*

¹ Prepared expressly for the American Law Register, from the original filed during Oct. Term, 1885. The cases will probably appear in 118 U. S. Rep.

² From J. Shaaf Stockett, Esq., Reporter: to appear in 64 Md. Rep.

³ From Hon. W. S. Ladd, Reporter; to appear in 61 N. H. Rep.

⁴ From Hon. Theo. T. Davidson, Reporter; to appear in 94 N. C. Rep.

⁵ From George B. Okey, Esq., Reporter; to appear in 44 Ohio St. Rep.

If, in such case, it had appeared that the bond was given for goods purchased in Virginia, the rule would be different: *Id.*

Quere, whether the contracting parties can agree on a rate of interest, and where the contract is made, but illegal where it is to be performed:

Donatio Causa Mortis.—The validity of a gift *causa mortis* is to be determined by the law of the place where it was made, without reference to the domicile of the donor: *Emery v. Clough*, 61 N. H.

CONSTITUTIONAL LAW.

Special Legislation—Municipal Corporation—Power of Removal—Governor.—An act of the general assembly conferring certain corporate powers on cities of the first grade of the first class, is one of a general, and not of a special, nature; and, therefore, not in conflict with the constitutional prohibition against the passage of special acts conferring such powers: *State v. Hawkins*, 44 Ohio 35.

The power conferred on the governor of the state to remove any members of the board of police commissioners, is administrative, and not judicial, in its nature; and, therefore, not in conflict with the clause of the constitution, conferring judicial power on the courts of the state:

Where charges, embodying facts that in judgment of law constitute official misconduct, are preferred to the governor, of which notice is given to the members charged, and he, acting upon the charges so made, removes them from office, his act is final and cannot be reviewed, or held naught on a proceeding in *quo warranto*, whether he erred or not in exercising the power so conferred on him: *Id.*

Fourteenth Amendment—Municipal Corporation—Regulation of a Business when Illegal.—The city of San Francisco, by ordinances, forbade "any person to establish, maintain or carry on a laundry within the corporate limits of the city and county of San Francisco without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone." There were at the time about 320 laundries in San Francisco, of which about 10 were owned and conducted by subjects of China, and of the whole number, viz., 820, about 310 were constructed of wood, the same material that constituted nine-tenths of the houses in the city of San Francisco. All the petitions of the Chinese were refused by the supervisors, and all the others, except one, were granted. *Held* (1), That the provisions of the fourteenth amendment are universal in their application, and extend to all persons within the territorial jurisdiction; and the equal protection of the laws is a pledge of the protection of equal laws. (2) That the ordinances were so administered by the public authorities as to amount to a practical denial by the state of that equal protection of the laws secured by said amendment: *Yick Wo v. Hopkins*, S. C. U. S., 118 U. S. 352, 120 U. S. 311, 121 U. S. 315, 122 U. S. 317, 123 U. S. 318, 124 U. S. 319, 125 U. S. 320, 126 U. S. 321, 127 U. S. 322, 128 U. S. 323, 129 U. S. 324, 130 U. S. 325, 131 U. S. 326, 132 U. S. 327, 133 U. S. 328, 134 U. S. 329, 135 U. S. 330, 136 U. S. 331, 137 U. S. 332, 138 U. S. 333, 139 U. S. 334, 140 U. S. 335, 141 U. S. 336, 142 U. S. 337, 143 U. S. 338, 144 U. S. 339, 145 U. S. 340, 146 U. S. 341, 147 U. 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CONTRACT.

Written Agreement—Construction.—When a written agreement consists of more than one distinct writing or contract, the different portions of all the parts should be given due weight in ascertaining intended meaning of any portion of the same; but if the language is clear and distinct, and the plain and obvious meaning of the words is consistent with the whole instrument, such meaning must be taken as the intended meaning of the parties, unless other parts of the agreement not only admit of, but require, a different construction: *The Cin. & C. Rd. Co. v. The Ind., B. & W. Ry. Co.*, 44 Ohio St.

CORPORATION. See *Public Policy*.

COVENANT.

Assignee of Lessee—Liability—Action at Law.—The liability of an assignee of a term to the original lessor, or those claiming under him, grows out of the privity of estate, and such liability continues only so long as such privity of estate exists: *Donelson v. Polk*, 64 Md.

An action at law cannot be maintained after the assignee has severed his relation to the land, in respect to breaches of covenant committed by him during the time of his holding. The remedy in such case is in equity: *Id.*

CRIMINAL LAW.

Errors and Appeals—Erroneous Ruling without Injury.—On an appeal in a criminal case, the ruling of the court below, although erroneous, will not be reversed, it being manifest that the accused was not injured by such ruling: *Swann v. State*, 64 Md.

DAMAGES.

Common Carrier—Punitive Damages—Evidence.—Punitive damages are not recoverable, unless there is an element of fraud, malice, gross negligence, insult, or other cause of aggravation in the act causing injury: *Holmes v. Carolina Cent. Rd. Co.*, 94 N. C.

Where the conductor of a railroad company, in obedience to the order of the company, ordered the plaintiff, who had purchased a first-class ticket, to occupy another car, not so comfortable as the one from which he was removed, but used no force or insult in removing him, it was held that the plaintiff was not entitled to recover punitive damages: *Id.*

Where the plaintiff is aware of certain rules of a railroad company and takes passage over the road for the purpose of violating these rules and bringing suit, his declarations to this effect, are admissible in mitigation of damages: *Id.*

Land Damages—How determined.—In determining the value of lands appropriated for public purposes, the same considerations are to be regarded as in a sale between private parties, the inquiry in such case being, what, from their availability for valuable uses, are they worth on the market. *Low v. Railroad*, 61 N. H.

As a general rule, compensation to the owner is to be estimated with reference to the uses for which the appropriated lands are suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future: *Id.*

EQUITY. See *Covenant*; *Insurance*; *Public Policy*.

Condition in Deed—Injunction.—A stipulation in a deed of a lot of land in the grounds of the Winnepesaukee Camp-Meeting Association prohibiting the erection or use of buildings for stores, boarding-houses, hotels, or stables thereon, without the consent of the association, is enforceable by injunction: *Winnepesaukee v. Gordon*, 61 N. H.

ERRORS AND APPEALS

Supreme Court of the United States—Jurisdictional Limit—Affidavits to show Amount in Dispute—Delay in Filing.—On a motion to reinstate a case dismissed for want of jurisdiction by the Supreme Court of the United States, it appeared that the case was docketed August 14th, 1883: that it was submitted January 7th 1886, but on looking into the record the court found nothing from which it could fairly be inferred that the value of the matter in dispute exceeded \$5000, and, consequently, on the 19th of January, entered an order of dismissal, on its own motion. The motion in question was not filed until April 26th, and was denied because the court was not willing, at so late a day, to receive and consider affidavits to supply the defect in the record: *Johnson v. Wilkins*, S. C. U. S., Oct. Term 1885.

Supreme Court of the United States.—Criminal Law.—Writs of error were brought to the Supreme Court of the territory of Utah, to review judgments of that court, affirming judgments of a district court of Utah, rendered on convictions on indictments under sect. 3 of the Act of Congress of March 22d 1882, for cohabiting with more than one woman. Each judgment imposed imprisonment for six months, and a fine of \$300. The jurisdiction of the Supreme Court of the United States was endeavored to be sustained under sect. 2, of the Act of March 3d 1885, giving jurisdiction, on appeal or writ of error in any case "in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, without regard to the sum of money or value in dispute;" held, that the authority exercised by the court in the trial and conviction of the plaintiff in error, was not such an authority as is intended by the act. The validity of the existence of the court, and its jurisdiction over the crime named in the indictments, and over the person of the defendant, were not drawn in question. "All that is drawn in question is whether there is or is not error in the administration of the statute." The writs of error were dismissed; and in *Canon v. United States*, 116 U. S. 55, in which the question of jurisdiction had not been considered, the judgment of affirmance was vacated and the writ of error dismissed: *Snow v. United States*, S. C. U. S., Oct. Term 1885.

EXECUTOR AND ADMINISTRATOR.

Non-Residence.—The non-residence of a person otherwise entitled does not of itself constitute disqualification for the office of administrator: *Ehlen v. Ehlen*, 64 Md.

EXEMPTION.

Claim of Partner out of Firm Property.—One partner, with the assent of the other, is entitled to have a personal property exemption

allotted to him out of the partnership property before the partnership debts are paid, and it is immaterial that he has individual property sufficient to make up the exemption: *State v. Kenan*, 94 N. C.

FRAUD. See *Debtor and Creditor*.

GIFT. See *Conflict of Laws*.

Donatio Causa Mortis—*Character of*—*Evidences of Debt*.—Bills, bonds and promissory notes, and all other evidences of debt, although payable to order and not endorsed, may be given as *donationes causa mortis*, and the donee may sue on them in his own name: *Kiff v. Weaver*, 94 N. C.

A *donatio causa mortis* partakes somewhat of the character of a testamentary disposition, but the assent of the personal representative is not essential to its validity. If needed to pay debts it may be recovered by the representative, but if there be a *residuum* of the gift after the payment of debts, it goes to the donee and not to the intestate's estate: *Id.*

INFANT.

Contracts Executory and Executed—*Confirmation*.—Where an infant sold his claim against his guardian for a present consideration, and promised to give a receipt for it when he became of age, it is an executed, and not an executory contract: *State v. Rousseau*, 94 N. C.

Where an infant enters into an executory contract, express confirmation or a new promise after coming of age, must be shown in order to bind him; but where the contract is executed, ratification may be inferred from circumstances, and any acknowledgment of liability, or holding the property and treating it as his own, will amount to such ratification: *Id.*

INJUNCTION. See *Equity*; *Waters and Watercourses*.

Bond—*Sureties*—*Dismissal of Action without Prejudice*.—An injunction undertaking was conditioned: "that the plaintiff shall pay to the defendants the damages which they or either may sustain by reason of the injunction in this action if it be finally decided that the injunction ought not to have been granted." On motion of part of the defendants and because co-defendants had not been served with summons, the court dismissed the action without prejudice to another action and the injunction was dissolved, and the costs were paid by plaintiff. Thereupon suit was brought, on the undertaking, for damages claimed by reason of the injunction. *Held*: Such dismissal of the action without prejudice and such dissolution of the injunction, do not constitute a breach of the condition of the undertaking: *Krug v. Bishop*, 44 Ohio St.

The sureties thereon cannot be required to pay damages for such injunction until it is "decided that the injunction ought not to have been granted:" *Id.*

INSURANCE.

Change of Beneficiary.—Where the by-laws of a mutual benefit association, in the nature of a life insurance company, provide that upon the death of a member the benefit shall be paid to his direction, the member may change the beneficiary by surrendering his certificate of membership: *Id.*

ship and procuring a new one made payable to the person therein named: *Barton v. Provident Mut. Rel. Asso.*, 61 N. H.

Reformation of Certificate of Membership.—A certificate of membership in a mutual relief association may be reformed after the death of the member by inserting the name of a beneficiary, when it appears that the secretary of the association and the assured both understood at the time of the application that the proposed name should be entered on the record without further direction: *Scott v. Provident Mut. Rel. Asso.*, 61 N. H.

INTEREST. See *Usury*.

LANDLORD AND TENANT. See *Covenant*; *Negligence*.

MORTGAGE. See *Usury*.

Bondholders—Coupons Purchased but not Paid—Priority of Lien.—Against bondholders who presented their coupons at the office of the company for payment and not for sale, and who had the right to assume that they were paid and extinguished, a person who advances the money to take them up, under an undisclosed agreement with the company that the coupons should be delivered to him uncanceled as security for his advances, is not entitled to an equal priority in the lien, or the proceeds of the mortgage by which the coupons are secured: *Cameron v. Tome*, 64 Md.

MUNICIPAL CORPORATION.

Construction of Sewers—Negligence.—The exercise by municipal authorities, of their judgments and discretion, in the selection and adoption of a general plan or system of drainage, is of a *quasi* judicial nature and not subject to revision by a court or jury in a private action; but the construction and repair of sewers, according to the plan adopted, are merely ministerial duties, and for any negligence in these, the municipality is responsible to a person whose property is thereby injured: *Johnson v. District of Columbia*, S. C. U. S., Oct. Term 1885.

Unauthorized Distillation of Spirits—Taxation.—A suit was brought by the City of Salt Lake, to recover certain taxes paid by it to the collector of internal revenue. The city distilled and sold spirits, and paid voluntarily the tax on the larger part of the spirits so distilled. The taxes in question were assessed against it for certain spirits distilled, and not deposited in the bonded warehouse of the United States. The contention of the city was, that, as it had no corporate authority to engage in distilling, it was not liable for the tax: *held*, that a municipal corporation cannot any more than any other corporation, or private person, escape the taxes due on its property, whether acquired legally or illegally, and it cannot make its want of legal authority to engage in a particular transaction or business a shelter from the taxation imposed by the government on such business or transaction, by whomsoever conducted: *Salt Lake City v. Hollister*, S. C. U. S., Oct. Term 1885.

NEGLECT. See *Waters and Watercourses*.

Landlord and Tenant—Liability of Tenant after Surrender of Premises for Negligent construction during Term.—A tenant who erects an

insecure fence on the premises is liable for injuries to a person occasioned by a fall of the fence after the tenant had surrendered and removed from the premises: *Hussey v. Ryan*, 64 Md.

PARTNERSHIP. See *Assignment*.

PATENT.

Patentability—Quantum of Invention.—A patent cannot be granted for an article old in purpose and shape and mode of use, when first made the first time out of an existing material, and with accordance before applied to such an article, merely because the idea occurred that it would be a good thing to make the article out of the old material: *Gardner v. Herz*, S. C. U. S., Oct. Term 1888.

The case of *Saxby v. Gloucester Wagon Co.*, 7 Q. B. referred to for the purpose of showing that the question of patentability depending on the *quantum* of inventive skill in a given case, the courts of England consider in a suit for infringement:

PLEADING. See *Slander*.

PUBLIC POLICY.

Home for Aged Persons—Condition of Admission—Concealment—Relief in Equity.—One of the conditions of admission into a home for aged persons, besides the payment of a stipulated entrance fee, was that the applicant should transfer to the institution all property or income of any kind which he possessed. *Held*, That such condition was neither *ultra vires*, nor against public policy: *General German Aged People's Home v. Hammerba*.

Where an applicant declared in writing, that he had no property other than the sum of \$300, the amount of his entrance fee, and when he entered into the institution without a conveyance of his property, and at his death, it was discovered that at the time of his application, he had \$1200 in money and notes, it was held, that the institution was not bound to relieve him, against the administrators of the deceased.

RAILROAD. See *Mortgage*.

REMOVAL OF CAUSES.

Colorable Assignment to Prevent Removal.—While United States courts have power, under the act of March 3, 1875, to dismiss a case, if it appears that a colorable assignment has been made for the purpose of imposing on their jurisdiction, no authority has been given them to take jurisdiction of a case by removal from another court when a colorable assignment has been made to prevent such removal: *Oakley v. Goodnow*, S. C. U. S., Oct. Term 1885.

Erroneous Statement of the Citizenship of a Defendant in Answer—Estoppel.—The answer of the defendant to the complaint was signed only by her attorney and was not under oath. It was stated that defendant was a citizen of New York: *Held*, That the answer thereby estopped from subsequently showing on a petition for removal of the case from the state to the United States Circuit Court that she was in reality a citizen of Massachusetts, it having been shown

mistake arose, and the defendant having promptly denied the erroneous statement as soon as it was brought to her attention: *Corson v. Hyatt*, C. U. S., Oct. Term 1885.

SLANDER.

Privileged Communication.—The reply of an employer to a discharged employee, in answer to a question as to why the latter was discharged, is privileged communication, and the burden is upon the employee to show the existence of malice: *Beeler v. Jackson*, 64 Md.

Pleading—Actionable Words—Slander of Title to Trade-Mark.—It is sufficient if the complaint states facts sufficient to show that a legal wrong has been done by the defendants, for which the law will afford redress: *McElwee v. Bluckwell*, 94 N. C.

In an action for slander of title to a trade-mark, where the injury complained of is not so much the defamatory words, but was occasioned by positive acts and threats, by which the customers of the plaintiff were deterred from trading with him, it was held error to nonsuit the plaintiff, because the complaint did not set out the actionable words: *Id.*

STATUTE.

Local Option Law—Repeal by Implication—Creation of New District.—Where, by an Act of Assembly, submitting the question to the voters of the several election districts of Caroline county, whether or not spirituous or fermented liquors should be sold therein, a majority of the votes in the third election district of the county was cast "against the sale of spirituous or fermented liquor" therein, and by a subsequent act of Assembly a new election district was established out of the said third election district, the prohibition will continue to apply to the inhabitants of the new district, there being nothing in the latter act at all inconsistent with the provisions of the former act: *Higgins v. The State*, 41 Md.

SURETY.

Settlement of Guardian's Account—Conclusiveness of.—In an action upon a guardian's bond for the recovery of the amount found due the wards upon a final settlement of the guardian's accounts in the probate court, the sureties are concluded by the settlement, and will not be heard, in the absence of fraud and collusion, to question its correctness or to demand a rehearing of the accounts: *Braiden v. Mercer*, 44 Ohio St.

TAX AND TAXATION. See *Municipal Corporation*.

UNITED STATES.

Contract with Navy Department—Form of.—The plaintiffs wrote two letters to the Chief of the Bureau of Steam Engineering United States Navy Department, offering to supply certain boilers at a specified price, which written replies were received stating that by direction of the Secretary of the Navy, the offers were accepted upon the terms and conditions named in plaintiffs' letters, and that specifications and drawings could be furnished as soon as prepared: *Held*, that these letters did not constitute a contract in writing and signed by the contracting parties within the meaning of Rev. Stat. sects. 3744-3747, and sects. 512-515;

but were nothing more in law and fact than preliminary made by the parties for use, in preparing a contract for execution required by law: *South Boston Iron Co. v. United S. S.*, Oct. Term 1885.

USURY. See *Conflict of Laws*.

Building Association—Mortgage.—By the terms of a building association mortgage weekly payments on a loan were required which amounted to more than six per cent., the rate of interest by statute. The phraseology of the mortgage indicated that the payments were for interest, expenses, &c.: *Held*, That the transaction was with usury; and the combination of interest with other payments was evasive and intended to avoid the operation of the statute: *Building Asso. v. Buck*, 64 Md.

WATERS AND WATERCOURSES.

Riparian Owners—Right to Build Embankment—Injuring Owner in case of Flood.—The owner of land on a river has a right to construct embankments to protect his land from current; provided such embankments do not occasion material damage to the owners of other lands on the stream; but if such embankment is so constructed that a man of ordinary prudence would reasonably expect damage to the owners of other lands in case of flood, the owner building them is liable for any such damages that ensue: *Rambo*, 44 Ohio St.

Embankments—Injunction.—Where all that can be inferred from the complainant states in his bill, is, that when a heavy rain happens, the stream will, if the embankment complained of overflows a portion of his land, and thereby destroy the crops there be growing thereon at the time of such freshet, such a bill made out as will warrant an injunction to restrain the defendant from maintaining the embankment: *Blaine v. Brady*, 64 Md.

Such an occasional overflow of a few acres of land, particularly more than a hundred acres, does not work a destruction of the crops, nor justify the granting of an injunction in order to prevent a possible mischief: *Id.*

WILL.

Subsequent Conveyance of Property—Revocation.—Where a testator has had the intention of a testator that all after-acquired property should pass by his will, a conveyance of all the estate previously devised by a trust deed containing a power of revocation which is exercised and the title revested in the testator, does not revoke the will; and upon the revesting of the title in the testator the estate is subject to the will, and the interest of the devisee as if no conveyance had been made: *Morey v. Sohler*, 61 N. H.

Devise—When not Charged with Legacy.—Real estate devised is not charged with a general pecuniary legacy, unless the same will, when there is nothing to show that such was the intention of the testator: *Davenport v. Sargent*, 61 N. H.

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FELLOW-SERVANTS.

ONE of the most important rules in the law of negligence is that a master is not liable to his servant for an injury caused by the negligence of a fellow-servant. The purpose of this paper is to show the meaning of the term "fellow-servant," as used in this rule.

It is not to be supposed that all the very numerous cases upon this subject can be reconciled; the most that can be done is to group them together in such a way as to show the different principles upon which they are based. Knowing these principles we can see the reason for the decision in any particular case.

The first instance of the application of the rule of fellow-servants is found in the case of *Murray v. Railroad Co.*, 1 McMullen (S. Ca.) 385 (1841); *Priestley v. Fowler*, 3 M. & W. 1 (1837), often cited as the first case upon the subject, is not an authority as to fellow-servants, for it is not stated therein by whose negligence the injury to the servant was caused. In the South Carolina case a fireman of a locomotive, injured by the negligence of the engineer, was held not entitled to recover from the common master, the railway company; the fireman and the engineer were fellow-servants.

The next case, and the leading one upon the subject was *Farwell v. Railroad Co.*, 4 Metc. 49 (1842); here the defendant railway company was held not liable to one of its engineers for an injury caused by the negligence of a switch-tender in its employ. In the opinion of the court (SHAW, C. J.), it is said: "They are appointed and employed by the same company to perform separate and distinct

duties, all tending to the accomplishment of one and the same purpose—that of the safe transmission of the trains.” And again “When the object to be accomplished is one and the same, whether the employers are one and the same, and the several persons employed derive their compensation and authority from the same source,” the rule is to apply, and all such servants are fellow-servants.

From a comparison of many cases upon the subject we may form the following definition: All servants employed by the same master working under the same control and in a common employment, are fellow-servants.

It thus appears that those servants are fellow-servants who are

I. *Employed by the same master*, and

II. *Under the same control*, and

III. *In a common employment*.

It is therefore necessary to know who are, and who are not, regarded as falling within these terms.

I. *What servants are employed by the same master*.—There is generally little difficulty in determining this. Those servants who “derive their authority and compensation from the same source, and are employed by the same master.

It is to be noted, however, that not every one who is employed by another is a servant. An independent contractor to whom work has been let out, and who has entire charge of such work, is not a servant. Therefore, he is not a fellow-servant of his employer's servants: *Mayhew v. Mining Co.*, 76 Me. 100 (1884). All servants of such a contractor are his only, and not those of the party engaging the contractor. Hence, servants of the contractor and those of the contractor's employers are not fellow-servants because they are not servants of the same master; for example: a servant of a contractor engaged by a railroad company to build a wall alongside a road-bed, is not a fellow-servant of the servants of the company in charge of a passing train: *Goodfellow v. Railroad Co.*, 106 Mass. 461 (1871); see also *Young v. Railroad Co.*, 30 Barb. 229 (1859); *Abraham v. Reynolds*, 5 H. & N. 143 (1860). But if the employer of the contractor has control and direction of the contractor's servants, such servants are not servants of the contractor exclusively, but of the employer or the contractor also; and hence they are fellow-servants of the employer's other servants in the same employment: *Johnston v.*

Boston, 118 Mass. 114 (1875); *Wiggett v. Fox*, 11 Exch. 832, (1856); *Ewan v. Lippincott*, 47 N. J. L. R. 192 (1885).

II. *What servants are under the same control.*—Many of the early cases regarded all servants as under the same control who were employed by the same master, for all such are subject to the same ultimate authority. It did not matter what the relative ranks of the servants might be; nor that one had the direction and control of the other; nor that one had power to hire and discharge the other. In accordance with this view, a superintendent having the entire charge of a factory, with authority to hire and discharge the operatives, was held a fellow-servant with one of the latter: *Albro v. Agawam Canal Co.*, 6 Cush. 75 (1850).

Such a view as to what servants are under the same control does not now generally prevail; for there is this limitation put upon it: Where the master takes no part in the business, but intrusts the entire control and management to a superintendent or manager, such person stands in the place of the master, and is not a fellow-servant of the servants under him. Such a person is often called a vice-principal of the master—sometimes is said to be the master's *alter ego*. The meaning of these terms is the same—one who is put by the master in the master's place and represents him towards the other servants.

This principle is well expressed in these words: "When the general management and control of an industrial enterprise is delegated to a superintendent with full power to hire and discharge servants, to direct their labors and obtain and employ suitable means and appliances for the conduct of the business, such superintendent stands in the place of the master," and is not a fellow-servant of those under his control: *Pantzar v. Mining Co.*, 99 N. Y. 368 (1885).

Instances of the application of this rule are numerous; the following cases illustrate it:

The owner of slaughter-yards employed an agent to manage them, with full power over them and the workmen in them; the agent was held not a fellow-servant of a workman employed by him in the yards: *Mitchell v. Robinson*, 80 Ind. 281 (1881).

The owners of a cotton mill intrusted to a general superintendent its entire charge and management, with power to purchase supplies and to hire and discharge the operatives; such a superintendent was not a fellow-servant of the operatives under his control: *Corcoran v. Holbrook*, 59 N. Y. 517 (1875).

Besides the above, the following late cases are directly *Ryan v. Bagaley*, 15 Mich. 179 (1883); *State v. Malster* 287 (1881); *Mayhew v. Mining Co.*, 76 Me. 100 (1884) *v. Jones*, 86 Penn. St. 432 (1878).

The same principle was adopted in a number of Eng (see *Murphy v. Smith*, 19 C. B. (N. S.) 360 (1865)) regarded as settled law until the case of *Wilson v. Merry* was in the House of Lords in 1868, in which it was wholly reversed, 1 H. L. 326. Lord BLACKBURN, commenting upon it, says: "The decision of the House of Lords is distinct that the servant held the position of vice-principalship does not affect the non-liability of the master for his negligence to a fellow-servant:" *Howell v. Steel Co.*, L. R., 10 Q. B. 6.

The later Massachusetts cases have approved of the rule in *Albro v. Agawam Canal Co.*, above referred to; and the English rule and the Massachusetts one is the same. Accordingly, all servants are under the same control who serve the same master, although the one may in fact occupy the master's place of the other; and the generally accepted idea of vice-principalship is not recognised.

According to the great weight of opinion, the relation of fellow-servants is not changed by the mere fact that one servant holds a higher rank in the service than the other, and has power to hire and control him; (see cases following.) Unless one be a vice-principal, all servants of the same master are under the same control without regard to their relative grade. The most frequent cases of this are the cases of foremen and conductors.

A foreman seldom has power to hire and discharge workmen. He does not act entirely upon his own judgment, being subject to the orders and control of a superintendent: he works in close hand with those under him; in short, he has not the entire control and control of the business or any department of it. He is generally held to be a fellow-servant with the workmen under his direction. This has been in terms decided in the following cases: the latest upon this particular point: *Doughty v. Penobscot*, 75 Me. 143 (1884); *Brick v. Rd. Co.*, 98 N. Y. 211 (1885); *Co. v. Carroll*, 89 Penn. St. 374 (1879); *Indiana C. R. Co. v. Parker*, 100 Ind. 181 (1884); *Peschel v. Rd. Co.*, 62 Md. 1 (1885); *State v. Malster*, 57 Md. 287 (1881).

Much the same is the position of a conductor of a rail-

towards the other servants upon it; having no general delegation of authority over them, and not being given the entire charge of any branch of the business of running the road, he is considered, by most of the cases, a fellow-servant of such other servants. The latest cases deciding this point are: *Cassidy v. Rd. Co.*, 76 Me. 488 (1884); *Slater v. Jewett*, 85 N. Y. 61 (1881); *Smith v. Potter*, 46 Mich. 258 (1881); *Pease v. Rd. Co.*, 61 Wis. 163 (1884).

But the rule that different ranks in service does not alter the relation of fellow-servants as between servants of the same master has not been universally accepted. A contrary view has been upheld in a number of states, and has been lately recognised and adopted in the Supreme Court of the United States.

In Ohio, it has long been settled that any one placed in authority over the servant, with power to control and direct him in the performance of his duties, is the *alter ego* of the master; or as has been more concisely said: "A servant is not a fellow-servant with one to whom he is subordinate." Hence a foreman is held not a fellow-servant of a workman under his control; a brakeman under the control of a conductor of a train is not a fellow-servant of such conductor: *Railroad Co. v. Keary*, 3 Ohio St. 201 (1854); *Railroad Co. v. Lavalley*, 36 Id. 221 (1880).

In holding a foreman of a lumber yard of a railway company, who had power to hire and discharge the laborers under his control, not a fellow-servant of such laborers, the Supreme Court of Illinois said: "When a railway corporation confers authority upon one of its employees to take charge of and control a gang of men in carrying on some particular branch of its business, such employee is the direct representative of the company" towards the men under his control: *Railroad Co. v. May*, 108 Ill. 288 (1884).

In Tennessee it is said that "the only sound rule is to hold the common superior (in this case the railway company), which can only act through its agents, responsible for all injuries resulting to the subordinate from the negligence of his immediate superior, or the party having control over him." And the court approves of the remark of Judge REDFIELD, that "we would be content to treat all subordinates who were under the control of a superior, as entitled to hold such superior as representing the master:" Redfield on Railways, I. 529 n.; *Railroad Co. v. Bowler*, 9 Heisk. 866 (1872).

The same rule prevails in North Carolina and Virginia: *v. Railroad Co.*, 84 N. C. 309 (1881); *Moon v. Railroad Co.*, 100 N. C. 33 (1885); s. c. 78 Va. 745.

The Supreme Court of the United States, by a divided vote, has adopted the same view in the case of *Railroad Co. v. Stout*, 112 U. S. 377 (1884); s. c. 24 Am. Law Reg. (N. S.) 99. There it was said: "There is, in our judgment, a clear distinction made in their relation to their common principal, between a conductor of a corporation exercising no supervision over others engaged in the same employment, and agents of the corporation who are connected with the control and management of a distinct department, and whose duty is entirely that of supervision and direction. The conductor, having the entire control and management of a train, occupies a very different position from the brakemen, porters and the others employed." And again: "The conductor of a railway train, who commands its movements, directs its progress, shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it and control over the persons employed upon it, represents the company," and is not the servant of such other persons. And the court affirmed the decision of the judge below, that as the relation of superior and subordinate was created between the conductor and engineer in the operation of the train, they were not fellow-servants within the reason of the law.

How far this decision will be followed in the various states is of course, impossible to say. Its principle has been already followed, however, in the conservative state of Connecticut in a case where a train dispatcher and engineer were held not to be fellow-servants. The court says: "To make no discrimination, but in all cases to place those who are invested with authority to direct and control on the same footing with those whose duty it is to merely obey, as directed without discretion and without responsibility, seems to us unwise and impolitic." *Darrigan v. Railroad Co.*, 5 Conn. 285 (1884); s. c. 24 Am. Law Reg. (N. S.) 452. And the court fully approves of the principles of the English "Employers' Liability Act."

This Act (43 & 44 Vict. c. 42, 1880,) changes almost entirely the rule laid down by the English courts, and provides, in substance, as follows, concerning this division of our subject: "If any men or their representatives shall have a right of action

their employers for injuries or death happening 1. By reason of the negligence of any one having superintendence intrusted to him. 2. By reason of the negligence of any person to whose orders the workman was bound to conform."

It will be observed that this statute seems to be based upon the principle which some of our courts have insisted upon as the only just and wise one; and that it aims to bring about, by legislative act, that which those courts, guided by what they consider proper policy, have accomplished of their own motion.

III. *What servants are in a common employment.*—The rule generally laid down in reference to this, is that all servants of the same master, whose labors tend to the accomplishment of the same general purpose, are in a common employment. Hence, all servants engaged in operating a mine, or railway, or factory, are within the rule. It was argued by counsel in *Farwell v. Railroad Co.*, before referred to, that what is now known as the rule of fellow-servants, should not apply in cases where servants are employed in different departments of duty, having no connection with and at a distance from one another, and where one could in no way observe or influence the conduct of the other. But to this the court replied that the distinction would be very difficult to apply practically; that to distinguish one department of duty from another would be impossible in many cases, and that therefore such a rule could not be adopted.

This view has been strictly adhered to in Massachusetts ever since the above case was decided. In a late case, *Holden v. Railroad Co.*, 129 Mass. 268 (1880), it was said: "It is well settled in this commonwealth and in Great Britain that the rule of fellow-servants is not confined to the case of two servants working in company, or having opportunities to control or influence the conduct of each other, but extends to every case in which the two, deriving their authority and compensation from the same source, are engaged in the same business, though in different departments of duty."

In a noted English case, *Bartonshill Coal Co. v. McGuire*, 3 Macq. H. L. C. 300 (1858), a much more limited view was taken. It was said that "in each case it is necessary to ascertain whether the servants are fellow-laborers in the same work, and that where servants are engaged in different departments of duty, an injury committed by one servant upon another by carelessness or negli-

gence in the course of his peculiar work, is not with emption." And in the same opinion, speaking of a case Scotch court held that a carpenter engaged in repairing carriage was not in a common employment with an engine-driver and the person who arranged the switches, Lord CHELMSFORD said the case might be reconciled with the authorities, on the ground that the workmen were in totally different departments of duty.

Later English cases, however, rejected this view, and the opinion came to be that servants are in a common employment although the object on which one is employed is "very different from that on which the other is employed," and in the same way employees it is said that "whenever the employment is as necessarily to bring the person accepting it into contact with the traffic of a line of railway" the rule of common employment applies. The same principle governs in the case of employees in industrial enterprise: *Morgan v. Rd. Co.*, L. R., 1 Q. B. 313 (1876). This view has been adopted in the courts of most of the United States, and it can be stated as the general rule, that all servants of the same master, engaged in the same general business, though in different departments of it, are fellow-servants in a common employment.

The following cases are in point: an engineer of a locomotive in a common employment with a telegraph operator employed by the railway company: *Slater v. Jewett*, 85 N. Y. 61 (1874); managers of different departments of a mine, subject to the control of a general superintendent: *Railroad Co. v. Jones*, 86 Me. 432 (1878); a track repairer and a fireman of a passing car: *v. Railroad Co.*, 38 Ohio St. 389 (1882). See also to the same effect, *Smith v. Iron Co.*, 42 N. J. L. R. 467 (1880); *Penobscot Co.*, 76 Me. 143 (1884); *Wonder v. Railroad Co.*, Md. 411 (1870); *Quincy Co. v. Kitts*, 42 Mich. 34 (1874); *v. Railroad Co.*, 33 Minn. 218 (1885).

But there are two limitations upon the rule just given. The first of these is well settled; the other is perhaps no more than a denial of the general rule.

1. Those persons who are charged with the performance of duties which the master owes to his servants are not in a common employment with such servants.

2. Those servants, who though employed by the same master, are working for the same general purpose are yet in such different

of service that they are not in a common employment with each other.

1. "The true rule is to hold the corporation [master] liable for negligence or want of proper care in respect to such acts and duties as it is required to perform and discharge as master or principal, without regard to the rank or title of the agent intrusted with their performance; as to such acts the agent occupies the place of the corporation:" *Flike v. Railroad Co.*, 53 N. Y. 549 (1873); see also cases *infra*.

The chief class of cases under this limitation is that arising from the negligence of servants employed to select safe and suitable machinery and to keep it in repair. To select such machinery and to keep it in repair is a duty which the master owes his servants; all persons of whatever grade, to whom the master has intrusted this duty are his personal representatives, and are not in a common employment with those servants who use such machinery.

The leading case upon this point is *Ford v. Rd. Co.*, 110 Mass. 440 (1872), in which it is said: "The agents, who are charged with the duty of supplying safe machinery, are not to be regarded as fellow-servants of those who are engaged in operating it. They are charged with the master's duty to his servant. They are employed in distinct and independent departments of service." And further, the master is "equally chargeable whether the negligence was in originally failing to provide, or in afterwards failing to keep its machinery in safe repair."

The rule is illustrated in the following cases. The mechanics to whom the making of repairs in engines is intrusted, are not in a common employment with an engineer: *Fuller v. Jewett*, 80 N. Y. 16 (1880); the master of mechanics, whose duty it is to select and purchase engines, is not in a common employment with a fireman: *Rd. Co. v. Moran*, 44 Md. 283 (1875). See, also, the following cases directly in point: *Shanny v. Mills*, 66 Me. 420 (1877); *Rd. Co. v. Herbert*, 116 U. S. 642 (1886); *Wilson v. Willimantic Co.*, 50 Conn. 433 (1883); *Brabbitts v. Rd. Co.*, 38 Wis. 289 (1875); *Rd. Co. v. Avery*, 109 Ill. 314 (1884); *Rd. Co. v. Leslie*, S. C. Penn., 20 Rep. 55 (1885).

Another duty which the master owes his servants is that of selecting and employing competent fellow-servants; and it is held, that those agents to whom this duty is intrusted are not in a common

employment with the other servants, because they are the master's duty towards his servants.

A superintendent intrusted with the duty of employing others, employed an incompetent one; the superintendent fellow-servant of an engineer injured by the negligence of the conductor: *Rd. Co. v. Decker*, 84 Penn. St. 419 (1877). The same effect: *Mann v. Rd. Co.*, 91 N. Y. 495 (1878); *Co. v. Kitts*, 42 Mich. 34 (1879).

Another duty which the master, where a railway company, owes to the servants, is the duty of keeping the road-bed in proper repair. Hence, those who are charged with this duty are not fellow-servants with those who use the road-bed. Hence, it is held that the contractor, builder and road-master are not fellow-servants of a firm. Hence, through the negligence of the former in failing to provide and care for a culvert of the road-bed of a railway: *Co.*, 55 Vt. 84 (1882). See also, *Drymala v. Thompson*, 40 (1879).

There are, of course, other duties which a master owes to his servants: as, the duty of providing a safe place to work, the duty of supplying a sufficient number of servants for the carrying on of the business in hand. In regard to these and other duties it is not doubted that those intrusted with their performance may be held not to be in a common employment with the other servants when proper cases are presented to the courts.

It is sometimes a question, whether or not certain duties are such which it is the duty of the master to perform, and for the performance of which he is to be held responsible to his servants. For example: the inspection of railway cars has been held by the courts to be a duty of the master to his servants, but in other cases it has been held not to be. Hence, decisions as to whether or not those charged with this duty are in a common employment with other servants are not, are conflicting, depending upon the view the courts take of its being a master's duty or not. The discussion of this question is foreign to our subject: *Tierney v. Rd. Co.*, 33 Minn. 258 (1881).

2. We have seen what the general view is as to the meaning of "common employment," and what servants are included within its terms. In the face of that view our second proposition seems a mere contradiction. Yet it is adopted by

ned courts, and is entitled to consideration. It is, in brief, that servants of the same master may be in such different departments of the same general business that they are not to be held fellow-servants.

In *Baird v. Pettit*, 70 Penn. St. 477 (1872), the defendant's business was the manufacture of locomotives, and the plaintiff was in employ as draughtsman; the latter was injured by the negligence of carpenters working about the buildings. "The workmen whose negligence he was injured were not engaged in the manufacture of engines nor in the performance of any service connected with the business;" they were, therefore, not in a common employment with the plaintiff.

This is plainly a departure from the rule hereinafter stated; other cases have gone still further.

In Illinois, it is held that to constitute common employment "it is essential that the servants were actually co-operating at the time of the injury in the particular business in hand, or that their usual duties should bring them into habitual consociation, so that proper action would be likely to result." Hence, a fireman upon a locomotive and a track-repairer are not in a common employment: *Railroad Co. v. Moranda*, 93 Ill. 302 (1879); *Railroad Co. v. O'Connor*, 100 Ill. 391 (1875).

In Kentucky, it is said that common laborers "in their employment having nothing to do with the cars or the running of them, are like the corporation's mere wood-choppers, comparative strangers to the engineer and his running operations. They are, therefore, not in the same service' with the engineer and his co-operators, but are in a different sphere, and constitute a distinct class:" *Railroad Co. v. Collins*, 2 Duvall 114 (1865); s. c. 78 Va. 745.

Cases in Tennessee and Virginia are to the same effect; *Railroad Co. v. Carroll*, 6 Heisk. 347 (1871); *Moon v. Railroad Co.*, 20 L. J. 33 (1885).

In the case of *Randall v. Railroad Co.*, 109 U. S. 428 (1883), the Supreme Court of the United States seems to have indicated, by implication at least, a leaning towards the same view. It is there said of two servants, who were held fellow-servants, "The fact that the two bring them to work at the same place, at the same time, so that the negligence of one in doing his work may injure the other in doing his work. Their separate services have an immediate common object—the moving of the trains." This would seem

to imply that if their duties did not bring them to work at same time and place, and if their separate services did not have immediate common object, they would not be in the same employment, and this view has been taken in a Federal Circuit Court case which decides that "a common hand engaged in distributing nails alongside of a track, and under the control of a foreman, is not in the same employment as a man controlling and managing a switch-engine not used in carrying these nails, but in moving them from one place to another cars not engaged in the business of running on said tracks: *Garrahy v. Railroad Co.*, 25 Fed. Rep. 258 (1887).

The English "Employers Liability Act," before referred to, provides, in substance, concerning this division of our subject, that a workman or his representatives shall have a right of action against his employer for injuries or death happening, 1. By reason of defects in ways, works, machinery or plant, arising from the negligence of the employer. 2. By reason of the negligence of any employee, having charge or control of any signal, points, locomotive engine or train upon a railway.

These provisions place the employees referred to in them in a different employment from the other servants of the master, thus changing materially the rules laid down by the English common law. Taking these provisions in connection with those before referred to, the act almost entirely abolishes the law of fellow-servant in England.

It is not very creditable to the English judges that Parliament has almost wholly done away with, provisionally at least, a rule which is entirely judge-made; which has been insisted upon as founded in justice and required by expediency, and which has been extended and broadened for forty years, in pursuance of a principle which has now been abolished by Parliament as unwise and unjust.

The law as to fellow-servants may be summarized as follows:

In Great Britain the common-law rules have been almost wholly abolished by statute.

The same thing has been done, as regards railway employees in Georgia: Rev. Code, sect. 2083, 3036; Wisconsin: Rev. Stat. sect. 1816; Kansas: Compiled Laws, sect. 5204, and Iowa: Rev. Code, sect. 1307.

In Massachusetts all servants of the same master are fellow-servants, except that those who select and repair machinery are not fellow-servants of those who use it.

In most of the other states the rule is the same, except that the doctrine of vice-principalship is recognised, and except that *all* those who are charged with the master's duty towards the servants are representatives of the master, and are not fellow-servants of the other servants.

In some states and in the Federal courts there is the further limitation that no servant is a fellow-servant of one to whom he is subordinate, and that servants in different departments of duty are not fellow-servants of each other.

EDGAR G. MILLER, JR.

Baltimore.

'RECENT AMERICAN DECISIONS.

Supreme Court of Pennsylvania.

BRIGGS v. GARRETT.

Citizens and voters have the constitutional right publicly to discuss and canvass the qualifications of candidates for public office, and information honestly communicated by one citizen to others at a public meeting, to the effect that a candidate for public office had been charged by a reputable citizen with grave misconduct, is a privileged communication, and the person communicating such information is not liable in an action for libel therefor, although the charge was false in fact and its falsity could have been discovered by inquiry.

Such communication being privileged, legal malice is not inferable, and on the trial of a civil action for libel against the party who made the communication the plaintiff is justified, in the absence of proof of actual malice, in entering a nonsuit.

The fact that reporters of the public press were present at the meeting at which the privileged communication was made is immaterial.

At a meeting of a body of citizens of Philadelphia, styled the "Committee of One Hundred," assembled for the purpose of considering the merits of candidates for public office, a letter reflecting severely upon the character of one of the judges of

Common Pleas, who was a candidate for re-election, by statements subsequently acknowledged to be wholly untrue, was, by order of the chairman, read by the secretary, and appeared at length the following day in the daily papers. *Held*, that the communication being based upon probable cause, was proper for discussion at such a meeting, and the court will not reverse a judgment of nonsuit entered in an action for libel brought against the chairman of the meeting.

MERCUR, C. J., and GORDON and STERRETT, JJ., dissent.

ERROR to Common Pleas No. 1, Philadelphia county.

Reargument. Case, by Amos Briggs against Philip C. Garrett, for libel. Plea, not guilty.

Amos Briggs, for plaintiff in error.

George H. Earle, Jr., and *Richard P. White*, for error.

The facts are fully stated in the opinion of the court delivered by

PAXSON, J.—This was an action for a libel. The nonsuited in the court below, and this writ of error the refusal of the court to take it off. It is necessary a diligent discussion of the law of the case that we should begin by an accurate statement of the facts. I take them as stated by the plaintiff in his history of the case, or proved by his witnesses at the trial. During the year 1882 the plaintiff was Judge of the Court of Common Pleas No. 4 for the county of Philadelphia. In the month of September of that year he was nominated for re-election to that office. At that time there existed, in the city of Philadelphia, a voluntary association of citizens known as the "Committee of One Hundred," the defendant, Philip C. Garrett, was the chairman. It is not necessary and perhaps would be improper, in a judicial opinion, to state the object and work of that committee. It is sufficient for the purposes of this case to say that it was composed of gentlemen of the highest respectability, and that its object was political, but not, however, generally to matters of a municipal character. Of the committee, whether as a body or as individuals, precisely those of any other citizens—neither more nor less. At a public meeting of the committee, held on the 16th day of September, 1882, at which the reporters of the city papers were invited, and in their presence and hearing, the defendant stated that he had received a letter from an ex-city official, in which it was charged that it was only by the charge of Judge BRIGGS to the jury that a \$200,000 steal in the *Hart Creek Sewer Case* had been made possible. The defendant then handed the letter to the secretary of the committee, with the remark that the secretary will read it. The secretary then read the letter aloud, in the presence of all present. It was as follows:

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*"Philip C. Garrett, Esq., President of the Committee of One Hundred—*MY DEAR SIR: The Hart Creek sewer steal, which was only made possible by Judge BRIGGS' charge to the jury

he charge and reflect on the facts. In the *first* place, the specifications were drawn for the express purpose of driving off all but ring bidders. *Second*. There was no effort made to hold the contractor to the specifications. He was allowed to tooth the bricks, when the specifications called for racking back. *Third*. The specifications called for a sewer impervious to water, when it was in evidence that a large number of crevices would hold a happy family of animals. *Fourth*. All the measurements were made by city officials in favor of the contractor. In one measurement the sewer was measured 30,000 too long.

"Your obedient servant, T. J. LOVEGROVE,
"One of the Hart Creek Sewer Experts."

The writer of this letter was a mechanical expert, and at one time had been an official in the service of the city. It was not denied that he was a reputable citizen. It is equally clear that Judge BRIGGS did not charge the jury in the *Hart Creek Sewer Case*. It was not even tried in his court, and it was conceded that the charge of the learned judge who did try it was fair, impartial, and in every way proper. Upon a motion for a new trial his rulings were unanimously sustained by the court *in banc*. Mr. Lovegrove, the writer of the letter, when on the stand, acknowledged that the letter, so far as it connected Judge BRIGGS, with the *Sewer Case*, was a mistake, and that it was his (Lovegrove's) mistake. He further stated that he did not communicate with Mr. Garrett, directly or indirectly, about the letter before sending it. It also appeared that a few days after the letter was read to the committee, Mr. Garrett received a communication stating that it was Judge FELL and not Judge BRIGGS who tried the *Sewer Case*, which letter was read in the same way, and with the same publicity before the committee by Mr. Garrett. The court below, upon this state of facts held that the letter came within the class of privileged communications in which malice is not presumed; and, as no actual malice was proved upon the trial, entered a judgment of nonsuit, which judgment the court *in banc* subsequently sustained.

In what follows we shall consider merely the responsibility of the defendant for his part in this transaction. We have nothing to do with Lovegrove, the writer of the letter, who originated and sent forth the charge against Judge BRIGGS. The defendant must answer precisely as any other citizen and voter.

Was the letter a libel? We listened to an ingenious argument at bar to show that it was not. It may be that a lawyer, reading it with care, would understand that the charge to the jury was constrained by the law, or that the evidence before him, to charge in the way he did, although it might be an unrighteous verdict. This is often the case, and no blame can be imputed to the judge. But would the jury regard it? There was no allegation that the object of the letter was to commend the action of Judge BRIGGS in the *Sewer Case*. That it was intended as a reflection is not an argument; and, assuming the statements contained in the letter to be true, regard being had to the excited state of the public mind at that time in reference to municipal corruption, we cannot say that it would have a damaging effect upon the public mind of those who knew Judge BRIGGS, and the perfect integrity with which he carried himself in his high office, would not be influenced by the letter. It is not necessary, however, in the view we take of the case, to discuss this question at length. We shall assume the letter to be actionable, unless excused by the circumstances of its publication.

This brings us face to face with the question, in what extent is it to what extent the fitness of a candidate for a public office is to be discussed by the people whose votes may elect or defeat him? It is a question of supreme importance, involving, on the one hand, the liberty of the press; on the other, the rights of the public, to be secure in their property and reputation. Both are protected by article 1, § 7, of the constitution, which declares: "The press shall be free to every person who may undertake to publish the proceedings of the legislature, or any branch of it, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that right. No conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers, or members of the legislature, in their capacity, or to any other matter proper for public discussion, or information, where the fact that such publication was made knowingly or negligently made shall be established to the satisfaction of the jury, and in all indictments for libels the jury shall have the right to determine the law and the facts under the direction of the court."

urt, as in other cases.]” The portion of the section inclosed in brackets is new ; the balance thereof is to be found in the constitution of 1838. The new portion refers only to a trial upon an indictment for libel, and does not apply to a civil action to recover damages. *Barr v. Moore*, 87 Penn. St. 385. Its discussion at present is therefore unnecessary.

The right of the citizen here given, to “freely speak, write or print,” is as broad as language can make it, with the single limitation that he shall be responsible for the abuse of that privilege. Would Mr. Garrett abuse it? When Judge BRIGGS accepted the nomination as a candidate for re-election to the judicial station which he then filled, he threw out a challenge to the entire body of voters of the county of Philadelphia to canvass his qualifications and fitness for that position. That involved, in the “fierce light that beats upon the bench,” not only his official conduct for the term just closing, but, generally, his fitness for the position of judge. This may be included many things beyond mere legal knowledge. A man may be a learned lawyer, and yet be wholly unfit for judicial station. There may be faults of temper, mental idiosyncrasies, and such manner of walk and conversation in private life as a people jealous of the reputation of their judiciary would never tolerate. If, therefore, these are elements proper for consideration in forming an estimate of judicial character, they are proper subjects for discussion, within the limits defined by the constitution. What those limits are I shall endeavor, as briefly as the importance of the subject will allow, to point out, so far as they affect this case. As preliminary to this discussion, it may not be out of place to refer to the latest deliverance of this court upon this subject. It will be found in *Ex parte Steinman*, 95 Penn. St. 220. In that case the plaintiffs in error, who were editors of a newspaper, as well as members of the bar were disbarred by the court below for publishing an article in their newspaper reflecting on the official conduct of the court. The order was reversed by this court, in an opinion by the late Chief Justice SHARSWOOD, in the course of which he said: Judges, in 1835, were appointed by the governor, and their tenure of office was during good behavior. There might, then, be some reason for holding that an appeal to the tribunal of popular opinion was, in all cases of judicial misconduct, a mistaken course, and unjustifiable in an attorney. The proceedings by impeachment or address were the course, and the only course, which could be

resorted to, to effectually remedy the supposed evil. the legislature was then the proper step. To appeal to was to diminish confidence in the court, and bring them to tempt without any good result. We need not say they altered, and that it is now the right and the duty of to bring to the notice of the people who elect the judges even of what he believes to be corruption or partisanship." by reason of his constant intercourse with the court, facilities for forming a correct opinion of the character of. But he has no higher right to comment thereon than has who elects him, and whose life, liberty and property are upon his official action.

In considering Mr. Garrett's liability for what occurred 16th of October, we must confine ourselves to his own made no charge against Judge BRIGGS, nor did he intend. He had no knowledge or information in regard to the character of the charge, nor did he profess to have. He received from a reputable citizen, addressed to him as chairman of a committee, containing certain statements about Judge BRIGGS, a candidate before the people for re-election. If true, the statements were important, and proper for public information. They preceded this. The letter was intended, as its address plainly showed, not for Mr. Garrett individually, but for the committee merely the conduit through which it was to pass. What he did As before stated, he said to the committee that he had received a letter from an ex-city official, containing a charge (specific) against Judge BRIGGS. This was true. He had received the letter, and it did contain such a charge. He then, in the course of business, handed the letter to the secretary, and asked the members to read it, and it was read. This is the sum of Mr. Garrett's offending. Much stress was laid upon the fact that the members were present, and that the letter was scattered broadcast all over the country next morning by the press. But for this the members were responsible, and whether their act was justified or not is a matter for which Mr. Garrett cannot be held responsible. He was not his act.

Was Mr. Garrett justified in giving the letter to the press in the manner he did? As it was not a private letter, but one given to the committee through him, he might perhaps have exercised his right to withhold it from those for whom it was intended.

We will not decide the case upon such a narrow point as this. We prefer to meet the broad question presented by the record. As before observed, Mr. Garrett had no knowledge as to the truth of the matters alleged in the letter. The plaintiff contends he had no right to make public its contents without having first made an investigation into the facts; and the words in the letter, "See the charge, and reflect on the facts," were pressed upon our attention as being calculated to put him upon inquiry. But we do not place such a construction upon this language. It was intended to emphasize the charge contained in the letter, not to express a doubt as to its truth. On the other hand, the defendant contended that the letter was a privileged communication; that it was written in good faith; that it was sent to Mr. Garrett, and by him communicated to the committee in good faith, and for a proper purpose; that, if true, the matters alleged were proper for public information; that, if true, it was still privileged, unless the parties knew it to be false, and therefore malicious. The plaintiff admits that if it was privileged, no recovery can be had without proof of actual malice. There was no proof of actual malice upon the trial, and it is almost unnecessary to say that the law does not imply malice in a privileged communication.

This brings us to the vital question in the cause, was this letter a privileged communication? We are here met with the inquiry, falsehood privileged? I answer, no. A lie is never privileged. It always has malice coiled up within it. When a man coins and utters a lie, or when he repeats it knowing it to be false, the law implies malice, and he cannot shelter himself behind the doctrine of privileged communications. I may illustrate this by the familiar instance of an inquiry into the character of a servant. If I say I believe him to be a thief, upon information derived from others, or from facts and circumstances within my own knowledge—in other words, if my statement is *based upon probable cause*,—the communication is privileged, and I am not responsible, even though it should appear I was entirely mistaken. If, on the contrary, I knowingly and falsely accuse him of dishonesty, such charge is not privileged, and I am liable in damages for the consequences of such statement. We have no concern with the knowledge or motive of the writer of the letter. Conceding, for the purposes of this case, that every word contained therein is false, and was known to be so by the writer; that it was sent out of pure malice to injure and

defame Judge BRIGGS—no such knowledge was brought against Mr. Garrett, nor is there anything in the case from which it can be justly imputed to him. So far as he is concerned, the charge is a mere take—nothing more. The difference between an honest communication made in the pursuit of a proper object, and a wilful falsehood made for the purpose of deception, is so palpable that we are not excused from dwelling upon it at length. It is mistaken to suppose that communications that are protected under the doctrine of privilege. An action to be privileged, must be made upon a proper occasion, for a proper motive, and must be based upon reasonable or probable cause. When so made, in good faith, the law does not imply malice in the communication itself, as in the ordinary case of libel. Malice must be proved before there can be a recovery; and whether a communication be privileged or not is a question for the court, not the jury.

An action for libel is upon all fours with an action for slander. The latter is but an aggravated form of the former. The law makes no distinction between them. When, therefore, a man charges another, under oath, before a magistrate, with a crime, without responsibility therefor, provided he acts upon probable cause, surely he may, upon probable cause, charge a candidate for public office with an act which, if true, would render him ineligible to receive the suffrages of the people; and if probable cause exists in either case, the question of malice becomes immaterial. It is useless to cite the authorities upon this point. I will refer, however, in passing to *Chapman v. State*, 10 Penn. St. 365; *Winabiddle v. Porterfield*, 9 Id. 137; *Smith*, 1 Id. 334.

Before I proceed further, I will notice some of the cases in which the principle has been applied. In *Gray v. Pentland*, 23, it was held that accusations preferred to the governor by a person in office, are so far in the nature of judicial proceedings that the accuser is not held to prove the truth of them, unless it is shown that they did not originate in malice, and without probable cause. In other words, that the accusations were privileged, and not the result of a presumption of malice. It was not contended in that case that it has been in any other, that a man may be liable for a privileged communication as a cover for malice and

In *Marks v. Baker*, 28 Minn. 162, the principle

ed by the Supreme Court of Minnesota: "The rule is that a communication, made in good faith, upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, public or private, either legal, moral or social, made to a person having a corresponding interest or duty, is privileged; that in such case the inference of malice, which the law draws from defamatory words, is rebutted, and the *onus* of proving actual malice is cast upon the person claiming to have been defamed." To the same point are *Quin v. Scott*, 22 Minn. 456; *Wighton v. Bishop of Lodor*, L. R., 4 P. C. 495; *Toogood v. Spryng*, 1 Cr., M. & R. 193; *Harrison v. Bush*, 5 E. & B. 344; *Id.* Torts, § 1091; *Moak's Underh. Torts* 146. If fairly warranted by any reasonable occasion or exigency, and honestly made, the communication is protected for the common convenience and welfare of society: *Toogood v. Spryng*, *supra*. It is sufficient to confer the privilege that the matter is of public interest to the community: *Kelly v. Tinling*, L. R., 1 Q. B. 699; *Purcell v. Coler*, 1 C. P. Div. 731; *Palmer v. Concord*, 48 N. H. 211; *Id.* Torts. 217. And where the subject-matter is of interest to payers, the communication is privileged, if made in good faith: *Smith v. Higgins*, 16 Gray 251; *Brush v. Prosser*, 11 N. Y. 347. Where the communication is privileged, plaintiff must show that it is not true, and that defendant had no reasonable grounds to believe that it was true: *McIntyre v. Bean*, 13 U. C. Q. B. 540. When the communication is privileged, and made or used in good faith, the plaintiff must sue the original slanderer, not him who repeats it in good faith: *Derry v. Handley* 16 Law T. (N. S.) 263. I conceive the law to be that, though that which is spoken or written may be injurious to the character of the party, yet if done *a fide*, as with a view to the investigation of a fact in which the party is interested, it is not libellous:" Lord ELLENBOROUGH, in *Maney v. Jones*, 3 Esp. 393. If there is probable cause, it is of consequence that the libel was malicious: *Streetz v. Wood*, 15 B. 105; *Cook v. Hill*, 3 Sandf. 350; *Klink v. Colby*, 46 N. Y. 1; *Bradley v. Heath*, 12 Pick. 163. In an action for a libellous communication to the appointing power, held, that the principles applicable for suits for a malicious prosecution govern, and, probable cause is a full defence: *Howard v. Thompson*, 21 Wend. 1; *Thorn v. Blanchard*, 5 Johns. 508. In case of a privileged communication, probable cause is a bar to the suit: *Chapman v.*

Calder, 14 Penn. St. 365. Charges made by a tax-payer at a public meeting are privileged: *Spencer v. Amaton*, 1 Moo. & R. 470. One of the strongest cases of privilege is that of *Brett v. Watson*, 20 Wkly. Rept. 723, where the defendant was employed to find out the character of a house. He was informed that it was a house of prostitution, and it was false. He repeated what he had been told to others, his object being *bonâ fide* to ascertain the character of the house. It was held that his communications were privileged. It is needless to multiply authorities. The doctrine of the foregoing cases is fully recognised in our own cases of *Gray v. Pentland*, 2 S. & R. 23; 4 Id. 420, 430; *Flitcraft v. Jenks*, 3 Whart. 158; *Chapman v. Calder*, 14 Penn. St. 365; *Brocker-man v. Keyser*, 5 Clark 152.

A number of authorities were cited by the plaintiff, which he contended were in conflict with the foregoing. Among others was *Barr v. Moore*, 87 Penn. St. 385. The most that can be made of that case is that it ruled that the publication in question was not privileged, and therefore was governed by the ordinary law of libel. No one doubts the accuracy of that ruling. The article was not only a libel upon its face: it was utterly false; was coined by the party who published it, without even a pretence that there was probable or reasonable ground to believe the charges were true. The pretence that it was proper for public information was a mere cloak to cover up malice, and to publish a falsehood for political effect. That case was decided upon sound principles, and does not touch the one in hand. The language of the court must be considered in connection with its facts.

Rowland v. Decamp, 96 Penn. St. 493, also cited by plaintiff, was an action of slander against a public officer. The charge was that he was a "damned thief," and that, "if any of the borough bonds [meaning the borough of Verona bonds] came into his hands [meaning the plaintiff's], he would steal them and run away with them." It was not shown that the charge was true, or that there was probable cause to make it. As before observed, mere lies are not privileged. A man may not charge a public officer with being a thief, knowing it to be false, and in the absence of reasonable, probable cause the *scienter* will be presumed. Malice follows of course. Public officials are not outlaws, to be hounded and maligned at the will of every person who may have incurred their enmity, and no well-considered case has so decided. There is no

room for the application of the doctrine of privilege to such instances.

Some stress was laid upon the fact that, even if the reading of the letter to the Committee of One Hundred was excusable on the ground of privilege, the privilege was taken away because of the presence of the reporters, and *Parsons v. Singey*, 4 F. & L. 247, was cited in support of this view. But the circumstance was overlooked that the reporters were also citizens and voters. They had the same interest in the fitness of Judge BRIGGS for judicial station as had the committee or any other citizens. If it was proper to read the letter at all, it was proper to do so in their presence and hearing.

Hamilton v. Eno, 81 N. Y. 126, and several other cases cited to show that to falsely accuse a public officer of a crime is not privileged, are wide of the mark. Supposing the letter to impute crime to Judge BRIGGS, whether it be misbehavior or corruption in office, we must not lose sight of the fact that Mr. Garrett made no such charge. He made no charge whatever. All he said was that some one else had made a charge in writing, stating briefly what Judge BRIGGS had been charged with, giving the name of the writer and the letter itself to the committee. How widely this differs from originating a false charge is plain to the dullest comprehension. I call attention to the facts of the case again that we may not be led astray upon a false issue.

The case narrows itself down to this: Conceding that a public officer, or a candidate for a public office, may not be falsely and maliciously charged with crime, or with anything else injurious to his reputation, have the voters, whose suffrages he solicited, the right to canvass and discuss his qualifications, openly and freely, without subjecting themselves to fine or imprisonment, or a ruinous suit for damages? If the voters may not speak, write, or print anything but such facts as they can establish with judicial certainty, the right does not exist, unless in such form that a prudent man would hesitate to exercise it. Is not the fact that a candidate is charged with crime by reputable citizens a matter proper for public information? Suppose, in the case in hand, the charge against Judge BRIGGS had been one for which he might have been indicted, is it possible that when two or three voters are gathered together, or where two or three hundred are assembled to consider his fitness for his office, the fact that such a charge had been made may not be

stated by one voter to the other without the peril of in damages in case the charge should subsequently be founded? And this, for an office for which the incumbent candidate should be like Cæsar's wife? A man's private life may be bad upon many points that it would be difficult to say how long as he remains in private life it matters little; but when he becomes a candidate for office, even his private vices become a matter of public concern. There are some official positions in which the people are properly jealous of the character of the incumbent and aspire to them. The judicial office is one of these, and it is much to say that there are many private vices which the public would not tolerate, if openly and notoriously indulged in. They would tear the ermine from his shoulders, and drive him from the bench. If, then, a candidate be a person of evil character, it is in the sense that it affects his fitness for the office which respectable citizens honestly so believe and so state—that such a statement be repeated by others in connection with the name of the candidate upon proper times and upon proper occasions, without the necessity of a libel suit? If not, we have indeed fallen upon evil times when the boasted freedom is but a delusion. The principle established here, if sustained by this court, would put a padlock upon the lips of every voter, and intelligent free discussion of the fitness of public men for office would cease. It would be a burden too heavy to be borne, and the people would be swift to reverse the decision either by an act of assembly, or, if necessary, a constitutional amendment. However unfounded the statements in question may now be acknowledged to be, it is clear to our view that there was probable cause for handing it to the committee, and if the charge had been of a criminal nature, there was probable cause for prosecution.

Referring to the three tests of privileged communication which I have already alluded to, they will all be found in this case. The occasion was a proper one. The meeting was composed of citizens and voters assembled for the very purpose of discussing the merits of candidates for office. At such a meeting it was the right, if not the duty, of any person present to state any fact bearing upon the fitness of either of said candidates for the positions they respectively aspired to. The circumstances of the case showed that the candidates had been charged by a reputable citizen with a conduct which was not consistent with a proper performance of the duties of the office.

ty was a fact which every elector present had a right to know and state. For aught that appears, it was done from a proper motive, and we have already said it was based upon probable cause. It was a mistake, but an honest one, and corrected as soon as discovered. It was a subject of just annoyance to Judge BRIGGS, and if the law does not furnish him the redress he seeks, it is because of a rule of public policy of far more importance than the inconvenience of a single citizen. That rule requires that free discussion, especially on political topics and candidates, shall not be so hampered as to make its exercise dangerous. The rule furnishes no shelter for the malicious libeller of private character, but it will not impute malice to one who honestly acts upon information received from other reputable citizens. We are accustomed so to act in all the affairs of private life, and if it we restrain it in public matters we afford protection to all the rogues and thieves who may, by their own cunning, or the negligence of the people, get into public office. In the enforcement of all general rules there will always be cases of individual hardship. But this is the sacrifice which the individual must make for the public good, just as the soldier is shot down in battle to preserve for others the blessings of free government. Speaking for myself, I would rather endure undeserved reproach than by any act of mine to impair a rule of so much importance to the public welfare. The people, sometimes hasty, are in the end always just, and will not long permit any public man to remain under a cloud, unless it is one of his own raising. Judgment affirmed.

MERCUR, C. J.—With all due respect for the judgment of the majority of this court, I must dissent therefrom. I will state some of the reasons which move me to this conclusion. The only question before us is whether the court below erred in not submitting the case to the jury. Although there may have been circumstances proper to consider in mitigation of damages, yet if, in any aspect of the case, the facts should have gone to the jury, it was error to withhold them.

It is well-settled law that any malicious publication, written, printed or painted, which, by words or signs, tends to expose a person to contempt, ridicule, hatred, or degradation of character, is a libel; and the person libelled may recover damages, unless it be shown that the publication was true, or that it was justifiably made:

Pittock v. O'Neill, 63 Penn. St. 253; *Barr v. Moor*
Neeb v. Hope, 17 Weekly Notes Cases 93. While mal-
 tial element in an action of libel, yet that must be un-
 legal signification. It may exist in the absence of
 and where there may be no ill-will or disposition to
 Legal malice alone is sufficient to support an action.
 tion have the other qualities of a libel, and it be v
 privileged, malice may be inferred: *Id.* An act, un-
 and injurious to another, is considered to be done
Pittock v. O'Neill, *supra*. Where the words used a
 import, they are to be interpreted according to the s
 they were actually used: *Hays v. Brierly*, 4 Wat
 words of a libellous publication are to be taken in
 sense. Words are not to be received *in mitiori sen*
 plain and popular sense in which the world in gener
 them: *Lukehart v. Byerly*, 53 Penn. St. 418. It
 law that every one who prints or publishes a libel m
 the person defamed, and to such an action it is no d
 was printed or published by the desire or procuremen
 whether that other be made a defendant to the action
 concerned in publishing the libel, or in procuring it to
 are equally responsible with the author: *Odgers*, S
 157: Townsh. Sland. & Lib. 167.

The letter, for the publication of which this suit was
 tains a strong imputation against the integrity of the
 that it was only by his official action and charge to th
 specified steal of \$200,000 was made possible. He
 ing as judge, and was a candidate for re-election.
 language of the letter the plain and reasonable sense
 ple generally would understand it, there cannot be a
 it imputes to him great misconduct or degradation of
 ter. So understood, they were libellous *per se*, and
 actionable. To remove this presumption the burd
 thrown on the defendant. It is conceded that the c
 the plaintiff was unqualifiedly false. He gave no
 jury in the *Hart Creek Sewer Case*, and was not i
 connected with the trial relating thereto. Admitting
 it is claimed on the part of the defendant that the p
 privileged. It is certain that the publication in this
 made under circumstances to be what the law declare
lutely privileged. It was not published in any le

known to the law, nor was it in any judicial proceedings. At most, the occasion could not make the publication any more than a *qualified privilege*. When a defendant, charged with libel, invokes such a protection to shield him from liability for that for which he would otherwise be held responsible he must prove that the occasion and surrounding circumstances made his action justifiable. The natural right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation: 1 Bl. Comm. 134. The security of his reputation or good name from the arts of detraction and slander are rights to which every man is entitled by reason and natural justice. The right to protect reputation is inherent in man. A good reputation is too valuable to admit of its being falsely and wrongfully assailed, without the law giving some redress to the person injured: *Barr v. Moore*, 87 Penn. St. 385. A reasonable and fair communication of thoughts and opinions is an invaluable right of man, yet a check on such freedom is imposed by the constitution of this commonwealth. Thus article 1, sect. 7, thereof, *inter alia*, declares that "every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty." Thus this right or liberty is not one of unlimited license, but is restrained by a legal responsibility: *Barr v. Moore, supra*. That the merits and demerits affecting the qualifications and character of one who is a candidate for a judicial office, as well as of one who is a candidate for any other public office, may be freely discussed and commented on, cannot be successfully questioned. These comments, however, have their bounds and limits. The right to discuss and to comment does not imply a license to falsely charge a person holding a judicial position, who is a candidate for re-election, with a specific act reflecting on his judicial integrity, and calculated to bring him into contempt and ridicule. Whenever a person makes such a charge, and claims protection under the name of a qualified privilege, the question of his motive in making it should be submitted to the jury. In my opinion it is clear error for the court to decide, as matter of law, that there was neither actual nor legal malice to be implied from the false charge. The well-recognised rule of law is correctly stated in Odgers, Sland. & Lib. 199. He says: "If, indeed, there were any means at hand for ascertaining the truth, of which the defendant neglects to avail himself, and he chooses rather to remain in ignorance, when he might have obtained full information, there will be no pretence for any claim of privilege."

In the present case the defendant was asked by his informant to "see the charge" of the judge, and to "reflect on the facts" shown thereby; in other words, to look at the record, and inform himself whether the construction put on the charge by the writer of the letter was correct. That record was conveniently accessible to the defendant. Any such record was a public record, kept in the centre of this city. The means were readily at hand for him to ascertain the truth. He neglected to avail himself of those means, and omitted to make an inquiry. He chose to remain in ignorance. The slightest examination would have shown that the improper conduct attributed to the plaintiff was false. Then, in the language of the law, there can be "no pretence for any claim of privilege." If such an allegation had been made against a personal friend of the defendant, it is hardly possible to conceive that he would have spread it before the public without first having made some effort to verify its correctness. "The plaintiff, however, is not bound to prove malice by *extrinsic* evidence. He may rely on the words of the libel itself, and on the circumstances attending its publication, as affording evidence of malice:" *Odgers, Sland. & Lib.* 270. The falsity of the words implies malice: *Farley v. Ranck*, 3 W. & S. 554; *Gorman v. Sutton*, 32 Penn. St. 247. As inquiry became the duty of the defendant before publishing the libel, he must be visited with constructive notice of what he could so readily have obtained by reasonable effort.

It may be asked, are the people to be prevented from criticising and discussing the conduct, character and qualifications of a candidate for office? Undoubtedly they are not. They must, however, confine themselves within the limits of truth, or permit a jury to pass upon their good faith and motive when they make a false charge: *Starkie Sland.* 110.

In an action for libel, it is for the court to determine whether the alleged libel is a privileged communication; but the question of good faith, belief in the truth of the statement, and the existence of actual malice, are questions for the jury.

Without elaborating the case further, I earnestly dissent from the action of the learned judge in deciding all these questions as matter of law, and in not permitting the jury to pass upon them.

GORDON and STERRETT, JJ., also dissent from an affirmance of the judgment, and concur in this opinion.

Supreme Court of Michigan.

BRONSON v. BRUCE.

Charges of crime, which are false, made in a newspaper against a candidate for Congress, though made without malice and in an honest belief of their truth, are not privileged communications ; but if they were published in good faith, after reasonable and proper investigation, this fact may go to mitigation of damages.

ERROR to Mecosta.

Frank Damon, for plaintiff and appellant.

Stone & Hyde, for defendant.

The opinion of the court was delivered by

CHAMPLIN, J.—At the general election in the year 1882, the plaintiff was a candidate for Congress. The defendant was then editor and publisher of the "*Big Rapids Current*," a newspaper published in the city of Big Rapids, in the county of Mecosta, and circulated in that and other counties in the congressional district which was sought to be represented in Congress by the plaintiff, as well as in other counties of the state outside of said district. The defendant, through the columns of his newspaper, opposed the election of the plaintiff to the office for which he was a candidate, and supported the election of the opposing candidates. After the plaintiff was placed in nomination for the office, and before the election to be held for representative in Congress, the defendant published in his paper, and circulated throughout the district, and sent the same to exchanges in other parts of the state, certain articles concerning the plaintiff which the plaintiff claims to be libellous, and this action is brought to recover damages therefor. The defendant pleaded the general issue, and gave notice (1), that he would prove that he was justified in so doing, for the reason that the alleged defamatory matter, and the several statements in the articles so published by defendant, were each true in substance and in fact as published ; and (2), that the same was a privileged communication, and statements therein were *bona fide* comments upon the acts and statements of said plaintiff of the several matters referred to therein, and of the acts, statements and conduct of the plaintiff in reference thereto, and of and concerning the plaintiff as a public man, and made for the public good, and were published as such comments without any malicious intent or motive whatever. At the trial the

publication was not disputed, or that the article is libellous if not true. It charged him with the crime of forgery ; of the theft of deposits of poor men and women ; and of cheating laboring men of their hard earnings.

Two questions are raised upon the charge of the court : (1) Upon the correctness of his instructions relative to the privileged character of the publication ; and (2) upon his instructions relative to the mitigation of damages.

The learned judge, after stating that privileged communications are of two kinds, and defining and illustrating what is absolute privilege, instructed the jury relative to qualified privilege as follows : " There is another kind of privilege which is not absolute, but which is conditioned, on the theory that there is no malice on the part of the person uttering the communication or publishing the libel. It is competent—it is justifiable—for the press to comment upon the character and standing—intellectually, morally, physically, and otherwise—of a man who offers himself as a candidate for office of trust. I say it is competent to do that, depending, of course, upon the circumstances of the case and the surroundings. When a man sees fit to take the stand before his constituency for a public position and public honors, he thereby, to a certain extent, makes himself public property, subjects himself to criticism by his constituency. And if it is made to appear that the criticism is just, is proper, is made in good faith, is made without malice and for the public good, for the purpose, as supposed by the person at the time, to prevent an incompetent and unfit and unsuitable person from receiving the majority of the votes of the electors of the district, or as the case may be, that article is *prima facie* privileged, and the law will require of the party who complains of the article to show that the same was published with bad motives, and not for good ends and purposes. * * * When that is shown, that privilege vanishes, and it is no longer a protection to the person apparently covered by it in the first instance. In this case, gentlemen, it appears beyond dispute that, at the time of the publication of these articles, Mr. Bronson was a candidate on a fusion ticket for Congress from this congressional district, and was then before the people for that purpose. These articles were published of and concerning him, reflecting upon his character and standing as a man, and his connection with the Exchange Bank, &c. And it is claimed by Mr. Bruce that he published these with good motives and justifiable ends, and

with no malice whatever. That is his claim. If that is true; if he had no malice, no disposition to specially injure this man, Mr. Bronson, but published the same in good faith, honestly believing that the occasion required it—then the communication is privileged, and the plaintiff cannot recover in this suit, even though the communications themselves were false; because if they were privileged by the occasion, that is a complete justification to the action. Right here is the starting point in the case: Were the articles privileged? They are *prima facie* privileged by the occasion, in my judgment, and I so charge you as matter of law. But it will be for you to determine whether this man Bruce, in the publication of the article, was actuated by private malice, or malice of any sort, at that time. If so, then that privilege ceased."

The constitution of this state provides that "no law shall ever be passed to restrain or abridge the liberty of speech or of the press; but every person may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of such right." Article 4, § 42. The publisher of a newspaper possesses no immunity from liability in publishing a libel, other than or different from any other person. The law makes no distinction between the newspaper publisher and any private person who may publish an article in a newspaper or other printed form; and if either of them abuses the right to publish his sentiments on any subject and upon any occasion, he must defend himself upon the same legal ground.

As was said by the Supreme Court of West Virginia in *Sweeny v. Baker*, 13 W. Va. 183: "The fact that one is a candidate for office in the gift of the people affords, in many instances, a legal excuse for publishing language concerning him as such candidate for which publication there would be no legal excuse if he did not occupy the position of such candidate, whether the publication is made by the the proprietors of a newspaper, or by a voter or other person having an interest in the election. The *conduct and actions* of such candidate may be freely commented upon, his *acts* may be canvassed, and his conduct boldly censured. Nor is it material that such criticism of *conduct* should, in the estimate of the jury, be just. The right to criticise the *action* or *conduct* of a candidate is a right, on the part of the party making the publication, to judge himself of the justness of the criticism. If he was liable for damages in an action for libel for a publication criticising the *conduct* or *action* of such a candidate, if a jury should hold his criticism

unjust, his right of criticism would be a delusion—a mere trap. The only limitation to the right of criticism of the acts or conduct of a candidate for an office in the gift of the people is that the criticism be *bona fide*. As this right of criticism is confined to the *acts* or *conduct* of such candidate, whenever the facts which constitute the act or conduct criticised are not admitted, they must of course be proven. * * * His talents and qualification, mentally and physically, for the office he asks at the hands of the people, may be freely commented on in publications in a newspaper, and, though such comments be harsh and unjust, no malice will be implied; for these are matters of opinion of which the voters are the only judges; but no one has a right by a publication to impute to such candidate, falsely, crimes, or publish allegations affecting his character falsely."

The authorities are numerous, and fully sustain the position that a publication in a newspaper concerning either a public officer, or a candidate for an elective office, which falsely imputes to him a crime, is not privileged by the occasion, either absolutely or qualifiedly, but such publication is actionable *per se*; the law imputing malice to the publisher or author: *Com. v. Clap*, 4 Mass. 165; *Curtis v. Mussey*, 6 Gray 261; *Aldrich v. Press Printing Co.*, 9 Minn. 133 (Gil. 123); *Seely v. Blair*, Wright (Ohio) 358, 683; *Root v. King*, 7 Cow. 613; *King v. Root*, 4 Wend. 113; *Rearick v. Wilcox*, 81 Ill. 77, 81; *Com. v. Odell*, 3 Pitts. 449-459; *Brewer v. Weakley*, 2 Overt. 99.

It was said by Mr. Justice CAMPBELL, in the case of *Detroit Daily Post v. McArthur*, 16 Mich. 447, that "the law favors the freedom of the press so long as it does not interfere with private reputation, or other rights entitled to protection. And, inasmuch as the newspaper press is one of the necessities of civilization, the conditions under which it is required to be conducted should not be unreasonable or vexatious." And again: "Where the wrong done consists in a libel, which can never be accidental, the publishing is therefore always imputed as a wrong motive, and that motive is called malicious."

In *Wittemore v. Weiss*, 33 Mich. 353, COOLEY, C. J., said: "The judge charged the jury that malice is to be presumed from the publication and its falsity; that to rebut this presumption, defendants must prove that they made the publication in good faith, believing it to be true in all its essential parts, and for a proper purpose. Defendants insist that the purpose is immaterial if they believed

that they published and made the publication in good faith. This might be so if the publication had been true ; but good faith cannot protect a false publication ; nor can one excuse himself for making a mistaken assault upon his neighbor's reputation, by showing the absence of malice, when, even had his charge been true, there was no purpose in bringing the matter to public notice. If one makes an attack which the occasion does not justify, there is no injustice in requiring him to show the truth."

In *Bailey v. Kalamazoo Publishing Co.*, 40 Mich. 251, 257, CAMPBELL, C. J., said : " The public are interested in knowing the character of candidates for Congress ; and while no man can lawfully destroy the reputation of a candidate by falsehood, yet if an honest mistake is made, in an honest attempt to enlighten the public, it must reduce the damage to the minimum if the fault itself is not serious, and there should be no unreasonable responsibility when there is no actual malice."

In *Peoples v. Detroit Post & Tribune Co.*, 54 Mich. 457, 462, Justice SHERWOOD said : " There can be no question at this day but that the public newspaper has the right (whether it will be regarded as its duty or not) to discuss those matters which relate to the life, habits, comfort, happiness, and welfare of the people. In doing so it may state facts, draw its own inferences, and give its own views upon the facts. It may err in its deductions, and if they are false they are not actionable unless special damages are shown ; but false assertions, when they impute the commission of a crime are actionable, and, when not based upon any facts legally tending to prove the acts imputed, the publication cannot be said to be privileged."

These excerpts from the decisions of this court show that they are in harmony with the authorities cited from other courts. The electors of a congressional district are interested in knowing the truth, not falsehoods, concerning the qualifications and character of one who offers to represent them in Congress ; and it is the right and privilege of any elector, or person also having an interest to be represented, to freely criticise the act and conduct of such candidate and show, if he can, why such person is unfit to be intrusted with the office, or why the suffrages of the electors should not be cast for him. But defamation is not a necessary and indispensable concomitant of an election contest. " Slander," says Judge OVERMAN, " is no more justifiable when spoken of a man with a view to

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his election than on any other occasion. Unhappy, indeed, would be any people when, in the exercise of one right, you destroy as important a one. Let his talents, his virtues, and such vices as are likely to affect his public character be freely discussed, but no falsehoods be propagated." To hold that false charges of a defamatory character made against a candidate are privileged as matters of law if made in good faith, and that the party making them is absolutely shielded against liability, it seems to me is a most pernicious doctrine. It would deter all sensitive and honorable men from accepting the candidacy to office, and leave the field to the profligate, the unprincipled and unworthy ; to men who have no character to lose, no reputation to blemish. It could scarcely be expected that any man worthy of the position would consent to stand for an office, and have his reputation tarnished, his good name scandalized in the face of the whole community, if such doctrine as this is to prevail. Besides, under the guise of assisting the people to select a fit man, the voters are deceived by falsehood and induced to withhold their support from the maligned candidate, and so two wrongs are perpetrated, one upon the candidate, the other in misleading the voter. Under such a rule the advocates of both or all candidates would let fly their poisoned shafts of defamation and charges, to be met with counter-charges, until the bewildered voter, not knowing who or what to believe, must of necessity shut his eyes to the fitness and character of the candidates, and join the ranks of the party whose banner bears the inscription, "Principles, not Men."

In a representative form of government, the public morals and the administration of public affairs cannot rise to a higher plane than the character of those who are elected as representatives, or to fill the offices. If public virtue is to prevail, and distinguish the execution of high public trusts, candidates for those positions must be men of virtue, as well as men of character and capability ; and the stability of our institutions in a great measure depends upon the confidence and esteem in which those occupying such high positions are held by their fellow-citizens. This cannot be attained if charges of crime against them, which are falsely made or circulated in the community, are absolutely privileged, though made in good faith. I think the circuit judge erred in laying down such rule. If the charges were false, and made in an honest belief of their truth, after reasonable and proper investigation, such fact would go to mitigate the damages, and under certain circumstances, such as

are alluded to in *Bailey v. Kalamazoo Publishing Co.*, the jury would be warranted in reducing the damages to a minimum.

In the case under consideration the parties were both residents of the city of Big Rapids, and they had resided there over ten years. It would seem an easy matter for the defendant to have informed himself of the truth of the statement of facts made in the article published. He testifies that he had no personal ill will against the plaintiff, and knew him very well. It seems reasonable, not as asking too much, for him in the course of his investigation to have called upon the plaintiff and requested a statement as to the truth of the charges he had heard and was about to repeat. The reasonableness of his investigation, however, was for the jury, under all the circumstances, from which they were to deduce the fact whether the publication was made in good faith, and with an honest purpose to enlighten the public upon the character and fitness of the plaintiff for the position he sought. The article claims to state facts, and those facts charged the plaintiff with a crime, and I think the defendant cannot excuse himself from liability without proving the truth of such charges.

The fact that the article was copied from a paper published in an adjoining county, and accredited to that paper, was received in mitigation of damages. This is the law in case of verbal slander, but the rule does not necessarily always obtain in cases of libel. It must depend upon the circumstances of the particular case.

The judgment must be reversed, and a new trial granted.

(The other justices concurred.)

The two principal cases form an important addition to the literature upon the interesting question therein discussed. In the case of *Express Printing Co. v. Copeland*, recently decided by the Supreme Court of Texas, and reported in 24 Am. Law Reg. (N. S.) 640, the rule was laid down, that where a person consents to become a candidate for public office conferred by a popular election, he should be considered as putting his character in issue so far as respects his qualifications for the office; and that whatever pertains to the qualification of the candidate for the office sought is a legitimate subject for discussion and comment; but statements and comments made must be con-

fined to the truth, or what in good faith and upon probable cause is believed to be true, and the matter must relate to the suitability or unsuitability of the candidate for the office.

A careful study of that case convinced us of its correctness and it is unnecessary to repeat what we there said. The principal case of *Briggs v. Garrett*, lays down substantially the same doctrine as the case above referred to, and we do not understand the dissenting judges to question this principle. Their contention was only that the question of good faith, belief in the truth of the statement and the existence of actual malice, were questions for the jury. *MERCUR, J.*, said: "It may

be asked, are the people to be prevented from criticizing and discussing the conduct, character and qualifications of a candidate for office? Undoubtedly they are not. They must, however, confine themselves within the limits of truth, or permit a jury to pass upon their good faith and motive when they make a false charge." Starkie, Slander 110.

The case of *Marks v. Baker*, 28 Minn. 162, referred to by the court in *Briggs v. Garrett*, is of more than ordinary interest in this connection. In that case the plaintiff was treasurer of the city of Mankato, and a candidate for re-election. The defendants being residents and taxpayers of said city, published a communication in a newspaper published in said city, of which they were editors and proprietors, charging or insinuating that the plaintiff had, as appeared by certain official reports, failed to account for city funds which had come into his hands as such treasurer, and that (as plaintiffs claimed) he had embezzled a portion of such funds; and it was held that such publication, if made in good faith, was privileged.

The case of *Crane v. Waters*, 10 Fed. Rep. 619, also supports the doctrine of *Briggs v. Garrett*. In that case LOWELL, J., said: "The modern doctrine, as shown by the cases cited for the defendants, appears to be that the public has a right to discuss, in good faith, the public conduct and qualifications of a public man, such as a judge, an ambassador, &c., with more freedom than they can take with a private matter or with the private conduct of any one. In such discussions they are not held to prove the exact truth of their statements, provided they are not actuated by express malice, and that there is reasonable ground for their statements or inferences, all of which is for the jury."

With reference to the principal case of

Bronson v. Bruce, it seems to us that the learned judge who tried the case at nisi prius made a very clear and concise statement of the law as it seems to be established by the weight of modern authority. It seems to us that the learned judge who delivered the opinion of the appellate court has drawn a picture of the evils flowing from the rule laid down in the court below, rather more lurid than the facts will warrant. He says, "Under such a rule the advocates of both or all candidates would let fly their poisoned shafts of defamation and charges, to be met by counter-charges, until the bewildered voter not knowing who or what to believe, must of necessity shut his eyes to the fitness and character of the candidates and join the ranks of the party whose banner bears the inscription 'Principles not men?'" Qualified as is the doctrine of the court in this case by the rule relating to the mitigation of damages, it is on grounds of public policy, impossible to deny that it is a reasonable rule; but the old rule laid down in the case of *King v. Root*, and other similar cases approved by the court in the principal case, is one which, as it seems to us, will not ultimately prevail in this country; and we are not aware that a more satisfactory state of morality on the part of the public press exists in New York and other states adhering to that doctrine than in Pennsylvania, Minnesota, and other states adopting the rule laid down in *Briggs v. Garrett*. Upon the whole, it seems clear that the weight of modern authority supports the rule laid down in *Briggs v. Garrett*, and that so long as trial by jury is preserved, there is no immediate danger of the subversion of the social fabric from the general adoption of the rule of this case.

M. D. EWELL

Chicago.

Supreme Court of Indiana.

KREAMER v. STATE.

Under a statute imposing a fine for the sale of liquor to a minor, no conviction can be had if the accused made the sale to the minor after the exercise of proper discretion, and in the honest belief that the purchaser was of lawful age.

An indictment, charging a single sale to one person only, for one price, of a number of commodities, the unlawful sale of either one of which, would, under the statute, constitute a public offence, is not bad for duplicity.

APPEAL from Clark Circuit Court.

E. C. Vance and John H. Stotsenburg, for appellant.

The Attorney-General, for the state.

The opinion of the court was delivered by

Howk, J.—In this case, the indictment charged that, at Clark County, on the first day of June 1885, Christina Kreamer did then and there, for the price of ten cents, unlawfully sell to Calvin Henley, a person then and there under the age of twenty-one years, intoxicating, spirituous, vinous and malt liquors. Under appellant's arraignment and plea of not guilty, the issue joined by consent was tried by the court; and a finding was made that she was guilty as charged in the indictment, and her punishment was assessed at a fine of \$20. Over appellant's motion for a new trial, judgment was rendered against her for the fine assessed and costs. Errors are assigned here by appellant, which call in question the overruling of her motion to quash the indictment; and (2) of her motion for a new trial. We will consider these alleged errors, and decide the questions thereby presented, in the order of their statement.

1. Did the trial court err in overruling appellant's motion to quash the indictment? This motion was in writing, and two causes were assigned therein for quashing the indictment, namely: First, "the indictment does not state any statutory offence: and, second, duplicity in such indictment, whereby the same is bad." It is manifest that it was intended to charge appellant, in and by the indictment against her, with the statutory offence which is defined, and its punishment prescribed in sect. 2094, Rev. Stat. 1881. So far as applicable to the case in hand, this section of the statute proceeds as follows:

Whoever, directly or indirectly, sells * * * any spirituous, vinous, malt, or other intoxicating liquors, to any person under the

age of twenty-one years, shall be fined in any sum not more than one hundred dollars, nor less than twenty dollars."

Appellant's learned counsel very earnestly insist, in their brief of this cause, that the indictment, the substance of which we have heretofore given, is bad for duplicity in this: that it charges, in a single count, the unlawful sale of spirituous, vinous, malt and intoxicating liquors. The indictment is badly constructed, and on that score is justly subject to criticism, but we do not think it can be correctly charged with duplicity, in the proper sense of that term, as applied to an indictment or other pleading. It charges a single sale to one person only, for one price, of a number of commodities, the unlawful sale of either one of which commodities would, under the statute, constitute a public offence. In other words, the indictment charges appellant with only one public offence punishable with only one punishment. In the recent cases of *Davis v. State*, 100 Ind. 154, and *Fahnestock v. State*, 102 Id. 156, we have held, and correctly so we think, that such an indictment is not bad for duplicity. See, also, *Stockwell v. State*, 85 Ind. 522; *Stout v. State*, 93 Id. 150, and *Stout v. State*, 96 Id. 407. The motion to quash the indictment in the case under consideration was correctly overruled.

2. Under the alleged error of the court in overruling appellant's motion for a new trial, it is claimed by her counsel that the evidence in the record shows, without conflict, that she made the sale of intoxicating liquor to Calvin Henley, as charged in the indictment, after exercising proper caution in the reasonable and honest belief that he was, at the time of such sale, of full and lawful age. We are of opinion that this claim of appellant's counsel is fully sustained by the record of this cause. Under our decisions, such a sale of intoxicating liquor to a minor, made under such circumstances, is not a criminal violation of our statute, making the sale of such liquor to a minor a public offence: *State v. Kalb*, 14 Ind. 403; *Rineman v. State*, 24 Id. 80; *Goetz v. State*, 41 Id. 162; *Payne v. State*, 74 Id. 203; *Hunter v. State*, 101 Id. 241. Appellant's motion for a new trial ought to have been sustained.

The judgment is reversed, and the cause remanded for a new trial.

Much of the law applicable to sales of intoxicating liquors to habitual drunkards is doubtless applicable to sales to minors, but this note is confined to the latter class of prohibited sales.

1. The doctrine laid down in the main case, that a sale of liquor to a minor upon the exercise of proper caution and in the belief that the minor is of lawful age, is not a criminal offence under stat-

tes similar to the one cited in the opinion, wherein intent is not mentioned as an element of the offence, is sustained by a line of decisions in Indiana, and by the authority of other states: *Moore v. State*, 65 Ind. 382; *Ward v. State*, 48 Id. 289; *Farbach v. State*, 24 Id. 77; *Brown v. State*, Id. 113; *Adler v. State*, 5 Ala. 16; *Marshall v. State*, 49 Id. 1; *Reich v. State*, 63 Ga. 616; *Faulks v. People*, 39 Mich. 200, and cases cited in opinion.

In *Goetz v. State*, 41 Ind. 162, the court said: "The most important question in the case is, whether the defendant was acting in good faith, supposing the witness to have been an adult at the time he sold the whiskey." But in the foregoing class of cases, proof of the sale and of the buyer's minority makes a *prima facie* case, to meet which the seller must show both that he believed, and had reason to believe the minor to be of lawful age: *Payne v. State*, 74 Ind. 203; *Goetz v. State*, 41 Id. 162; *State v. Kolb*, 14 Id. 403; *Reich v. State*, 63 Ga. 616. And in *Marshall v. State*, 49 Ala. 21, it was said, "the burden of proof is on the defendant and he must prove his good intention beyond a reasonable doubt." Inquiring his age of the minor is not sufficient: *Reich v. State*, *supra*.

"It is more important that the young should be protected from temptation, than that those who have not reached their majority should be able to purchase with facility; and therefore, the vendor should be held to the exercise of great care and caution:" *Rineman v. State*, 24 Ind. 80.

In determining the question of the vendor's *bona fides*, the appearance of the minor at the time of trial is not an element for the jury's consideration: *Robinson v. State*, 63 Ind. 235; *Ihlinger v. State*, 53 Id. 251.

2. In opposition to the doctrine of the main case, the weight of authority favors the doctrine that where the statute does

not mention intent as an element of the offence, the seller is conclusively liable, however honest and well founded his belief in the lawful age of the minor: *Redmond v. State*, 36 Ark. 58; *Crampton v. State*, 37 Id. 108; *Edgar v. State*, *Ibid.*; *Pounders v. State*, Id. 399; *Flynn v. Galesburg*, 12 Ill. App. (Brad.) 200; *Dudley v. Sautbine*, 49 Ia. 650; *Roberge v. Burnham*, 124 Mass. 277; *State v. Cain*, 9 W. Va. 559; *State v. Gilmore*, Id. 641.

In *State v. Hartfiel*, 24 Wis. 60, the court said: "The words 'knowingly' and 'wilfully,' or other words of equivalent import, are omitted from the statute, and the offence is made to consist solely in the fact of a sale of intoxicating liquors or drinks to a minor. Of this nature are many fiscal, police and other laws and regulations, for the mere violation of which, irrespective of the motives or knowledge of the party, certain penalties are enacted; for the law, in those cases, seems to bind the party to know the facts, and to obey the law at his peril. The act in question is a police regulation, and we have no doubt that the legislature intended to inflict the penalty, irrespective of the knowledge or motives of the person who has violated its provisions. Indeed if this were not so, it is plain that this statute might be violated times without number, with no possibility of convicting offenders, and so it would become a dead letter on the statute book, and the evil aimed at by the legislature remain almost wholly untouched."

"The law imposes upon the licensed seller the duty to see that the party to whom he sells is authorized to buy, and if he makes a sale without this knowledge, he does it at his peril. This is the clear meaning of the law, and any other construction would render it exceedingly difficult, if at all possible, ever to procure a conviction for a violation of this clause of the statute. This construction imposes no hardship upon the licensed

seller. If he does not know the party who seeks to buy intoxicating liquors at his counter is legally competent to do so, he must refuse to make the sale:" *McCutcheon v. People*, 69 Ill. 601.

It is incumbent on the vendor of liquors to know that his customer labors under no disability, as it is for him to know the law, and his ignorance of neither will excuse him:" *Ulrich v. Commonwealth*, 6 Bush (Ky.) 400.

"It is not as though it was lawful to sell generally. Being unlawful to sell to any and all classes, he applied for and obtained a license to sell only to a portion of the community, and he must see that he sells to only such as is permitted by his license:" *Farmer v. People*, 77 Ill. 322.

"The business in which the liquor vendor engages is an unlawful business except under circumstances, and when he sells he assumes the burden of knowing that these circumstances exist. * * * When one sells intoxicating liquors, he must know at his peril whether or not a lawful sale can be made to the purchaser:" *Jamison v. Burton*, 43 Ia. 282.

"It has been held, that while an honest and reasonable belief in the lawful age of the minor is no defence to a criminal action, it may be shown in mitigation of the offence:" *Grampton v. State*, 37 Ark. 108.

3. Where the words "wilfully" "knowingly," or words of like import are used, the prosecution must show that the seller "knew or had reason to know" that the buyer was a minor: *Perry v. Edwards*, 44 N. Y. 223; *Hunter v. State*, 18 Tex. App. 444.

4. Where the statute provides for the sale of liquor to minors upon the consent of parents, guardians, physicians, &c., the seller must be careful to come within a strict construction of the statute: *Jamison v. Burton*, 43 Ia. 282; *State v. Fairfield*, 37 Me. 517.

The seller must show such consent:

Farrell v. State, 32 Ala. 557; *Edgar v. State*, 37 Ark. 219; *Pounders v. State*, Id. 399. And if no person be living capable of giving the required consent there can be no legal sale: *Waller v. State*, 38 Ark. 657.

Where the statute makes no provision for sales upon the consent of parents, &c., such consent when given will constitute no defence to an action: *Bain v. State*, 61 Ala. 75; *Adler v. State*, 55 Id. 16; *State v. Clotts*, 33 Ind. 409; *Grepel v. State*, 32 Ohio St. 167.

5. Where the statute is to the effect that "whoever by himself or his agent or servant shall sell," &c. (Ill. Stat.), the authorities are not agreed upon the question of the principal's liability for unauthorized sales by his agent. Some states maintain that in such a sale there can be no criminal intent on the part of the principal and therefore no offence: *Zeller v. State*, 46 Ind. 304; *Thompson v. State*, 45 Id. 495; *Lauer v. State*, 24 Id. 131; *Anderson v. State*, 22 Ohio St. 305.

In *Hanson v. State*, 43 Ind. 550, the court, holding such a sale no offence, said: "But can we presume that the defendant when he left the bartender in charge of the bar, made him his agent to sell to a minor, an act which would be in violation of law?"

On the other hand, the liability of the principal for his agent's sales, unauthorized and even contrary to instructions, has been strongly argued: *Dudley v. Sautbine*, 49 Ia. 650; *McCutcheon v. People*, 69 Ill. 601; *Roberge v. Burnham*, 124 Mass. 277.

"The law says to persons wishing to engage in selling spirituous liquors, or to be interested in the sales thereof, you must be careful in the selection of your partners, or servants, and watchful of their conduct in your business; for if they make forbidden sales, you are responsible. * * * If you are not willing to engage or be interested in the bus-

ess on these terms, there is no compulsion upon you to do so:" *Robinson v. State*, 38 Ark. 641.

"They forbade him [barkeeper], to sell liquor to minors. So did the law. His duty was no more clearly defined nor made any more imperative by such instructions or commands. * * * Under his employment to sell over their counter in the general course of their trade, he was placed in a position by them where he was necessarily called upon to exercise a discretion in determining the legality of every proposed sale, and it must be held that in passing upon such a question, and in the determination of the fact, according to his best judgment, he was acting within the scope of power conferred upon him and within the scope of his employment." *Rlynn v. Galesburg*, 12 Ill. App. (Bradw.) 200.

6. One present at an illegal sale, aiding in the capacity of change-maker, is liable: *Johnson v. People*, 83 Ill. 431. Where the liquor is sold to an adult, by whom it is given to a minor, to be drunk at the bar, the seller has been held not liable, unless the buyer was obviously the agent of the minor: *Siegel v. People*, 106 Ill.

89. But otherwise if the seller knows that the liquor is purchased for the minor: *State v. Munson*, 25 Ohio St. 381.

"The fact that it may have been purchased by the defendant, with money furnished in whole or in part by the minor, whereby the liquor became the property of the minor, will not relieve the defendant of guilt" on a charge of illegal giving: *Commonwealth v. Davis*, 12 Bush (Ky.) 240.

"Nor will it be a defence, that the liquor was sent for with money, by a third person, to whom it might lawfully have been sold, and that the agent was so informed when he delivered it to the minor: *State v. Fairfield*, 37 Me. 517; *Commonwealth v. Finnegan*, 124 Mass. 324; *Bain v. State*, 61 Ala. 75. But see *Commonwealth v. Lattinville*, 120 Mass. 385; *Randall v. State*, 14 O. St. 435. See, also, *Ross v. People*, 17 Hun 591.

Where the charge is for selling or giving liquor to a minor, "the ownership of the liquor is not an ingredient of the offence." CHAS. A. ROBBINS.

Lincoln, Neb.

Supreme Court of Ohio.

JAMES v. BOARD OF COMMISSIONERS OF ALLEN COUNTY.

Where an employee, engaged under a contract for a specified time, the wages being payable in instalments, is wrongfully discharged before the expiration of the period of hire, and all wages actually earned at the time of the discharge have been paid, an action will not lie to recover the future instalments as though actually earned, but the remedy is by action for damages arising from the breach of the contract, and no recovery upon such claim is a bar to a future action.

ERROR to District Court Allen County.

Isaiah Pillars and Prophet & Eastman, for plaintiff in error.

Mead & Townsend, for defendant in error.

The opinion of the court was delivered by

SPEAR, J.—This action is brought to recover for wages claimed

to be due from the defendant to the plaintiff upon a contract made December 13th 1881, whereby, in consideration that plaintiff would faithfully and diligently serve the defendant as superintendent of the stone and brick work in the construction of the court-house then in progress of erection at Lima, until the stone and brick work should be completed, &c., the defendant agreed to employ plaintiff as such superintendent during the period aforesaid, and to pay him for his services at the end of each and every month the sum of \$100. The petition avers that the plaintiff entered upon the employment, and discharged the duties thereof until April 6th 1882; when although the stone and brick work was not completed, and the plaintiff was, and has since been, ready and willing to perform all the conditions of said agreement upon his part, the defendant refused to allow him so to do, and to pay him therefor, and discharged him therefrom without any reasonable cause, and has since hitherto refused to employ plaintiff for the remainder of said term. On the 18th day of August 1883, plaintiff duly requested defendant to pay him his wages due him for his services upon and by reason of said contract for the period of two months from the 13th day of June 1882, to the 13th day of August 1882, which defendant refuses to do, whereby plaintiff has lost the wages he otherwise would have obtained from said employment from said 13th June 1882, to said 13th August 1882, to his damage in the sum of \$200, for which, with interest from August 13th 1882, he asks judgment. The answer of the defendant sets up in bar an alleged former recovery for the same cause of action between the same parties, upon the same contract, at the October Term 1882, of the Court of Common Pleas of Allen county, at which term a judgment upon the merits was rendered in favor of plaintiff for \$205.30. The petition of the plaintiff in the former case is set out, and is identical with the petition in the present case, except as to time, the pleader averring in the first petition, loss of wages from April 13th 1882, and asking to recover for that. To this answer a demurrer was interposed, which was overruled by the Court of Common Pleas, and judgment entered for defendant, which judgment was affirmed by the District Court. To reverse this judgment of affirmance the present action is prosecuted in this court. The question presented is whether, under such a contract as is here set out, the employee can, after being discharged, nothing being due him for wages actually earned, maintain an action for each instalment as though earned, upon an

allegation of readiness to perform the work ; or whether his action is simply one for damages for the employer's breach of contract, and he is limited to one action and one recovery for such damages. If he can have his option as to these remedies, then the cause of action in the first petition was not the same as in the present one, and the former judgment would not be a bar ; if he cannot, but is limited to the last-named remedy, to wit, to damages, for breach of the contract, then, if both are based upon the same breach, it would follow that they are identical, and that one vacancy would necessarily exhaust the plaintiff's remedy, and so the former recovery would be a bar. There is but one dismissal—but one breach—pleaded. The dismissal was one act ; and as to the recovery of damages for that, plaintiff could not split up his cause of action, recovering a part of his damages in one suit, and the remainder afterwards. He must include all that belonged to that cause of action in his first petition, so that one suit and one recovery should settle the rights of the parties. It would be at his own risk and peril if he negligently or ignorantly omitted a part of what might properly have been embraced in the cause of action, in his first suit. His mistake, if he made one, might be matter of regret, but that could not change the rule of law.

The contention in support of plaintiff's claim, is that neither action was brought to recover damages for breach of contract on the part of the board, but that the plaintiff, having his option, upon being discharged, either to regard the contract as broken by the conduct of the employer, and sue immediately for damages for its breach, or treat the contract as subsisting for all purposes, and maintain an action for each instalment as it became due, chose the latter, and this he might do, because, having been discharged without fault on his part, his rights were not lessened, nor was he bound to treat the contract as at an end. Having this choice of remedies, it is insisted one suit to recover upon instalments past due at the commencement of the action, and judgment thereon, would not bar a future recovery upon instalments becoming due thereafter. A contrary view, it is argued, would entail great injustice. Under it the employee would be compelled, unless he were content with such meagre damages as he could prove immediately after his discharge, or, at most, with less than his real loss, to wait until all were due before recovering anything ; and, inasmuch as the object in contracting for pay by the month probably was that he might thus

support himself and family, they would be left to suffer while waiting for the last instalment to become due, and he would thus be driven, in any event, to unreasonable hardship and to a sacrifice of his rights because of the wrongful act of the employer—a condition of affairs which the law would not justify.

That the doctrine contended for appeals strongly to the feelings, and is not without plausibility, would seem to be apparent from the statement, and that it has met with the favor of courts in several instances is apparent from an examination of the cases cited by counsel. Still the question remains, does it rest upon solid foundation?

The first case in order of time is that of *Gandell v. Pontigny*, 4 Camp. 375, decided at Nisi Prius term of the King's Bench by Lord ELLENBOROUGH in 1816. Plaintiff was clerk for defendant at 200*l.* per year, payable quarterly. August 11th, defendant discharged plaintiff, and paid him for half quarter between July 1st and August 15th. Plaintiff denied the power to discharge, and offered next day to continue work, which defendant declined. Lord ELLENBOROUGH's decision is as follows: "If the plaintiff was discharged without sufficient cause, I think this action maintainable. Having served a part of the quarter, and being willing to serve the residue, in contemplation of law, he may be considered to have served the whole. The defendant was therefore indebted to him for work and labor in the sum sought to be recovered."

John William Smith in his note to *Cutter v. Powell*, 2 Smith Lead. Cas., pt. I., says that "a servant wrongfully dismissed has his election of three remedies: *First*, a special action for breach of contract, and he may pursue this remedy at once; *Second*, he may wait until the termination of the period for which he was employed, and then, perhaps, sue for his whole wages in *indebitatus assumpsit*, relying on the doctrine of constructive service;" and he cites *Gandell v. Pontigny*.

Two cases are cited from the Supreme Court of New York, where a similar doctrine is held. In *Huntington v. Ogdensburgh & L. C. Rd.*, reported in 7 Am. Law Reg. (N. S.) 143, decided by JAMES, J., the holding is that "where a person employed for a certain term at a fixed salary, payable monthly, is wrongfully discharged before the end of the term, he may sue for each month's salary as it becomes due, and the first judgment will not be a bar to another action for salary subsequently coming due."

In the case of *Thompson v. Wood*, 1 Hilt. 96, INGRAHAM, J., says, "When an agreement of this kind is broken, the person has his election either to sue for his wages as they become due from time to time, or to bring one action for damages for breach of the contract." This holding that the employee may sue for wages as they become due from time to time, was not necessary to a decision of the case, and was apparently based upon the holding of Lord ELLENBOROUGH, before quoted.

Strauss v. Meertief, 64 Ala. 299, is to the same effect. BRICKELL, J., in deciding the case, says: "It is not matter of doubt that when a contract is made for personal services for a particular term at stipulated wages, if the party employed is, without cause, discharged during the term, * * * he is not compelled to accept the breach of his employer as a termination of the contract. He may elect to treat it as continuing, and, keeping himself in readiness to perform the contract on his part, may recover the wages due on the expiration of the term; and if the wages are payable by instalments, he may sue for and recover each instalment as it becomes due."

Other cases by the same court hold a like doctrine, and it seems to have been accepted by the courts of Mississippi, Missouri, Illinois and Wisconsin.

The decisions in these cases appear to rest upon the doctrine of "constructive service." In several of them it is adopted in words; in others the principle is assumed without designating it by that title. If that is not their basis, it is difficult to see that they have any. The theory of that doctrine seems to be that, inasmuch as the employee holds himself to do the work, therefore he has done the work; that readiness is, for all purposes, equivalent to performance. For the purpose of allowing a recovery in some amount his readiness to do and tender of performance may have the effect of performance to the extent of putting the employer in the wrong; but how can it be said, in truth, that he has done the work—that he has performed? The claim is based upon a fiction, an untruth. There is no acceptance of the services; there is no delivery of them; the defendant has not had the benefit of them; he has not had value received; and upon what principle is it that in law he is liable for the agreed price when he has not received the commodity which he agreed to buy, and the other party has not parted with the commodity which he agreed to sell? The doctrine of "constructive service," as applied to a case of this character, is

one beset with difficulties. It requires a plaintiff to assume that to exist which in fact has no existence. He is demanding wages when he is rendering no service. The doctrine contradicts the very term itself. How can he truthfully aver, as in *indebitatus assumpsit*, that the defendant is indebted to him *for work and labor done*? Averring it, how could he prove it? But aside from the matter of pleading and proof, in order to recover upon the strength of this doctrine the employee must not only be willing to perform on his part, but must hold himself in readiness to perform. This implies that he will remain idle. Public policy, not to say public morals, forbids the encouragement of an idle class. Being subject to the universal rule that a person by the act of another is bound to use ordinary diligence to make the damages as light as may be, the discharged employee must use ordinary care to obtain employment. He may not be required to seek elsewhere, or to engage in a different industry. But he is bound to use ordinary effort to obtain similar employment in the same vicinity. At least if such employment is offered, he is bound to take advantage of it. It would be a direct encouragement to idleness to hold that he who may have, but refuses, similar services, is entitled to full compensation the same as though he performed full labor. This rule stands squarely across the path of "constructive service;" for, if the workman is bound to accept employment of another employer, how can he continue ready to resume work under his former employer? A learned writer, whose valued paper in support of the doctrine of "constructive service" is cited by counsel uses this language: "The doctrine of constructive service, however, does not permit an employee who has been wrongfully discharged, to remain wilfully idle during the period for which he has been engaged." A most singular conception of the groundwork of the doctrine, it seems to us. Being actually at work for B., how can he be constructively at work for A.? Being required to hold himself in readiness to resume his work for A., how can he engage with B.? Engaging with B., how can he be ready to resume work with A.?

"Constructive service," as here sought to be applied, never had, as we think, support in principle, and, in large measure, the support heretofore found for it upon authority has disappeared. The case of *Gandell v. Pontigny*, after being followed in several cases in England, was overruled in *Archard v. Hornor*, 3 Car. & P. 349, which was approved in *Smith v. Hayward*, 7 Adol. & E. 544, and

in the later case of *Goodman v. Pocock*, 15 Adol. & E. (N. S.) 576. To like effect will be found *Beckham v. Drake*, 2 H. L. 606, and in *Emmens v. Elderton*, 4 H. L. 645. Mr. Smith's second proposition in his notes to *Cutter v. Powell*, is expressly disproved in *Goodman v. Pocock*; ERLE, J., giving as a reason why it was not maintainable, that "the servant would not, if it were true, be permitted to engage in any other work, and would be compelled to remain idle and unemployed, while it is undoubtedly the law that he should use due diligence in seeking other like employment in the same vicinity, and not eat the bread of idleness." And in *Clossman v. Lacoste*, 28 Eng. Law & Eq. 140, a still later case, Lord CAMPBELL says: "But if the contract is entirely broken, and the relation of employer and employed put an end to, I agree that the party suing ought to allege in his declaration the whole gravamen that he suffers by such breach of contract, that he may receive therein all the damages that may inure to him in consequence."

So that it may not be too much to say that the doctrine of "constructive service" has, in England, where it had its origin, been repudiated, and the law there established that a servant wrongfully discharged has no action for wages unless something is due for past services actually rendered; and as to any other claim on the contract it is for the breach of it, and for his damages resulting therefrom, being the ordinary action for damages, and not the common-law action of *indebitatus assumpsit*.

Nor are the cases in New York, heretofore referred to, now authority in that state. For this, see *Moody v. Leverich*, 4 Daly 401, where the holding is to the effect that a servant wrongfully dismissed, cannot wait until the expiration of the period, and then sue for his whole wages on the ground of constructive service, his only remedy being an action for breach of the contract of hiring. Also, *Howard v. Daly*, 61 N. Y. 362, where *Gandell v. Pontigny*, *Thompson v. Wood*, and the cases in Alabama, Mississippi, Missouri, and Wisconsin are distinctly disapproved, and the doctrine of "constructive service" declared to be "so opposed to principle, so clearly hostile to the great mass of authorities, and so wholly irreconcilable to that great and beneficent rule of law, that a person discharged from service must not remain idle, but must accept employment elsewhere if offered, that we cannot accept it. * * * The doctrine of constructive service is not only at war with principle, but with the rules of political economy, as it encourages idleness,

and gives compensation to men who fold their arms and decline service equal with those who perform with willing hands their stipulated amount of labor."

The cases of *Chamberlin v. Morgan*, 68 Penn. St. 169; *Wiloughby v. Thomas*, 24 Gratt. 522; *Whitaker v. Sandifer*, 1 Duv. 261; *Chamberlin v. McCallister*, 6 Dana 352; and *Miller v. Goddard*, 34 Me. 102, show that a like view is held by the courts in those states; while Wood's *Mayne Dam.* 317, 328, and Wood *Mast. & Ser.* 246, 247, indicate that the author considers the great weight of authority to be in the same direction. On page 246, of the latter work, Mr Wood uses the following emphatic language:

"It (the doctrine of constructive service) was finally exploded, and the doctrine established that a person wrongfully discharged could not, by simply holding himself in readiness to perform his contract, be regarded as having *in fact* performed it, and thus be entitled to sue for and recover his wages for the entire term, *but* that he must be restricted in his recovery to the amount of his actual loss. The action in such cases is not for wages, but for breach of contract. It cannot with any propriety be claimed that an action for wages can be sustained when the servant has in fact rendered no service. Such a doctrine is in defiance of the meaning of the term, and rests upon no solid foundation either in principle or policy."

See also an instructive paper by Mr. Thornton, of the Indianapolis bar, on this subject in 8 *South. Law Rev.* 432; and for a full discussion of the present case, see the able opinion of the judge who presided in the Common Pleas, reported in 9 *Law Bulletin* 186.

To sustain the doctrine of "constructive service" would be in effect to hold that the contract is one which could be enforced specifically; for if, after discharge, and after the employer had repudiated the contract on his part, and laid himself liable to full damages for its breach, the employee could treat the contract as subsisting in such sort as to recover upon instalments as wages earned, when in fact they were not earned, and recover as each came due, the result would be a specific performance of the contract and that too, by a multiplicity of suits. Surely, no lawyer would seriously ask a court of equity to specifically enforce a contract which in its nature gives to the aggrieved party so plain and full a remedy at law in an action for damages.

As a result from authority as well as upon principle, we are

satisfied that such a contract as the one in the case at bar, where the employee is wrongfully dismissed, but all wages actually earned up to that time are paid, the only action the employee has, whether he brings it at once or waits until the entire period of hire has expired, is one for damages for the breach of the contract, and the measure of damages will be the loss or injury occasioned by that breach; and one recovery upon such claim, whether the damages be denominated loss of wages or damages for breach is a bar to a future recovery.

The judgment of the District Court is affirmed.

The doctrine that an employee wrongfully discharged before the expiration of the term of hire, can, by waiting until such time and holding himself in readiness to perform, recover the full amount of his wages from the time of discharge to the end of the term, has been either directly or indirectly repudiated in several states: *Ricks v. Yates*, 5 Ind. 115; *Reed v. Burt*, 78 N. Y. 191; *Madden v. Porterfield*, 8 Jones L. 166; *Sherman Trans. Co.*, 31 Vt. 162; *Heim v. Wolf*, 1 E. D. Smith 70; *Rogers v. Arkham*, 8 Ga. 190; *McDaniel v. Marks*, 19 Ark. 671. But, on the other hand, there is considerable authority to the effect that, where the servant has been discharged without any fault upon his part, he may recover the full amount of his wages to the end of the contract term, less what he has been able to realize from other employment, and some courts have considered this holding to recognize the doctrine of constructive service: *Cong. v. Peres*, 2 Cald. 620; *Birk v. Hartman*, 63 Penn. St. 97; *Samlin v. Race*, 78 Ill. 422; *Costigan v. Moharok, &c., Rd.*, 2 Denio 609; *Booge v. Pacific, &c., Rd.*, 33 Mo. 212; *Jones v. Jones*, 2 Swan 605; *Armfield v. Nash*, 31 Miss. 361; *Pooler v. Ar-*

is held, that the duty of the servant upon being discharged, is to seek other employment, and thereby decrease the damages. BRICKELL, C. J., says: "The only loss for which, in this action founded on the contract, compensation can be claimed, is the wages which would have been earned. But the next day, or at any other intermediate period, like employment, at the same, or greater wages, by a party as to whom there is no just exception is offered him; or he can obtain it by the exertions made ordinarily by men out of employment. What damages has he sustained, except the loss of wages when the act of the defendant left him necessarily unemployed? He may not continue unemployed from choice, merely to recover from the defendant the wages he had contracted to pay. Neither good morals, nor the law, will countenance him in persisting voluntarily in idleness, that the amount of his recovery may not be diminished." That was a case where the suit was brought for damages for the breach of the contract of hire.

In *Thompson v. Wood*, and *Huntington v. Ogdensburgh, &c., Rd.*, also cited as favoring the rule of constructive service, it was in reality decided that the measure of damages was the wages contracted for, less what the plaintiff had earned or might have earned. In both of them, however, the actions were for wages due, but from the language of the

In *Strauss v. Meertief*, cited in the principal case as holding the plaintiff may recover for constructive service, it

judges who delivered the opinions, it is evident they regarded the amounts recovered more in the light of the damages for the non-fulfilment of the contract rather than wages for constructive service. See, also, *Moody v. Leverich*, 4 Daly 401, where the two latter cases are fully considered and explained. None of the three cases just cited can be said to hold to the rule of constructive service: that a wrongfully discharged servant may by waiting and making no effort to secure work, recover his wages as though he had actually performed the service which would entitle him to them. *Gandell v. Pontigny*, cited *supra*, evidently does hold that way, but it was a *nisi prius* decision, besides being unsatisfactorily reported.

Other cases have been cited as sustaining the doctrine of constructive service, but in none of them, upon close inspection, can it be ascertained that they do so hold: *Armfield v. Nash*, 31 Miss. 361; *Gordon v. Brewster*, 7 Wis. 355; *Booge v. Pacific Rd.*, 33 Mo. 212; *Fowler v. Armour*, 24 Ala. 194.

A late text writer has said: "The damages recovered are not for constructive services; but compensation for being prevented from earning the stipulated wages according to the contract of hiring." *Sutherland Dam.*, II. 475.

The authorities generally concede that the wages for the balance of the contract term are *prima facie* the measure of damages to be assessed; but subject to be lessened by proof on the part of the defence that the plaintiff has earned wages, or by using reasonable effort might have done so. The reason for it being, that the plaintiff cannot, by inactivity on his part, increase the defendant's damages. It seems the wages agreed upon are an aid in determining the damages.

That the discharged servant must use reasonable diligence to find employment cannot be doubted; and what is reasonable diligence depends upon all the circumstances of the case: *Howard v. Daly*,

61 N. Y. 362; *Byrd v. Boyd*, 4 McCord 246; *Meade v. Rutledge*, 11 Tex. 44. He is not bound to seek employment other than that in the same line in which he has been employed: *Strauss v. Meer-tief*, *supra*; or at a distance and among strangers: *Gillis v. Space*, 63 Barb. 177; *Hamilton v. McPherson*, 28 N. Y. 72.

As to burden of proof in cases of this nature, the rule is that where the defendant alleges the ability of the plaintiff to get employment, or the fact that he did get it, in mitigation of damages, the burden of proof is upon him to show it: *Costigan v. Mohawk, &c., Rd.*; *Kirk v. Hartman*; *Cong. v. Pares*, *supra*; *King v. Steiren*, 44 Penn. St. 99; *Wabcock v. Poole*, 9 Ark. 394. But in some cases it has been held, the plaintiff must show his inability to procure employment, in making out his case, and if he has secured it, what he has realized therefrom: *Hunt v. Crane*, 33 Miss. 669; *Hearne v. Garrett*, 49 Tex. 619. In *Hunt v. Crane*, it was held, the plaintiff might show that he found work, or if he failed to do so, he could show his inability after due diligence. But *Hearne v. Garrett* went further, and declared the plaintiff to be entitled to recover the full amount "on proof that he had not been able to get other remunerative employment." This cannot be said to be the law, notwithstanding the rule seems to be the more reasonable of the two. The result of the efforts that have been made in that direction, lies within the knowledge of the plaintiff, and it could neither put him to extra expense or inconvenience to adopt such a rule.

Mr. Benjamin, in his work on Sales, upon the subject of breaches, uses the following language: "A mere assertion that the party will be unable or will refuse to perform his contract is not sufficient; it must be a distinct and unequivocal absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the

promise was made ; for, if he afterwards continue to urge or demand compliance with the contract, it is plain he does not consider it to be at an end ;" *Benj. Sales*, sect. 568, and cases ; *Smoot v. United States*, 15 Wall. 36. And in a late case in the Supreme Court of the United States, it was held, following *Johnstone v. Milling*, 16 Q. B. Div. 460,

that " the words or conduct relied on as a breach of the contract by anticipation must amount to a total refusal to perform it, and that does not, by itself, amount to a breach of the contract, unless so adopted and acted upon by the other party : " *Dingley v. Oler*, 6 Sup. Ct. Rep. 850.

A. G. McKean.

Supreme Court of Vermont.

WEATHERHEAD v. STODDARD.

No estate will be held contingent unless very decided terms of contingency are used in the will, or it is necessary to hold the same contingent, in order to carry out the other provisions or implications of the will.

A. devised real and personal property to trustees to hold in trust for P., with a direction to apply, from time to time, such portion, or if necessary the whole of the income to the support of P., and upon the latter's arrival at the age of eighteen, or in case of her marriage before that age, then to pay over to her the whole estate or such portion thereof as in their judgment should seem most for her benefit and advantage, leaving this matter to the best judgment and discretion of the trustees. P. arrived at the age of eighteen, but the trustees in the exercise of their discretion withheld the payment of the principal. Upon P.'s death, held, that P. took a vested estate which passed to her devisees.

J. M. Tyler and Martin & Eddy, for plaintiff.

Haskins & Stoddard, for defendant.

The opinion of the court was delivered by

ROWELL, J.—Alanson E. Weatherhead died testate in 1862, leaving only one child surviving him, Phoebe Mary Hope Weatherhead, then about two years old. His will was duly probated, and the third clause of it reads as follows :

" I give and bequeath all my estate, real and personal, to Galusha Weatherhead, Marcus Weatherhead, and Lysander W. Howe, to be held by them in trust for my daughter and only child, Phoebe Mary Hope Weatherhead ; and I hereby direct the trustees above mentioned to apply from time to time such portion, or if necessary the whole of the income from said trust estate towards the support, maintenance, and education of the said Phoebe Mary Hope Weatherhead ; and when she shall arrive at the age of eighteen years, or in case she shall marry before arriving at the age aforesaid, then in either case the said trustees shall pay over to the said Phoebe Mary

Hope Weatherhead the whole of the said trust estate, or such portion thereof as in their judgment and discretion shall seem most for the benefit and advantage of the said Phœbe—and I leave this matter to the best judgment and discretion of the aforesaid trustees."

By the fourth clause of his will, in case the said Phœbe died before eighteen, the testator disposed of all his estate by divers bequests over.

The said Phœbe was never married, and died testate at about the age of twenty-three. Her will was duly probated, whereby, after one or two small specific legacies, she gave the use of the residue of her estate to Gertrude A. Lynde, now Mrs. Hunt, for life, with remainder over.

Said trustees retained in their hands all of said estate, paying therefrom only what was necessary for the support and education of the said Phœbe, and never paid the same over to her after she became eighteen, acting in withholding it according to their best judgment and discretion, and as they deemed most for her benefit and advantage, and she never demanded it of them.

The plaintiff claims that by the terms of the will, the taking of a vested interest in her father's estate by the said Phœbe was made to depend upon the judgment and discretion of the trustees, and as their judgment and discretion were never exercised in her favor by paying over the estate to her, she never took a vested interest therein; while the defendant claims that she took a vested interest therein on the death of her father, subject to be defeated only by her death before eighteen, and that on becoming eighteen, the estate became hers absolutely, and would have descended to her heirs had she died intestate, and that, if it did not vest in her at least at eighteen, then there was no testamentary disposition of it after that, and so she took it by inheritance.

This last contention is not sound, for there was at all events a discretionary trust, liable to be executed in favor of the said Phœbe by paying the fund over to her at any time after she became eighteen, and hence there was a testamentary disposition, operative as long as she lived with the trust unexecuted; for the legal estate which vested in the trustees by the will, would continue in them as long as the purposes of the trust required it. BAYLEY, J., in *Doe d. Player v. Nicholls*, 1 B. & C. 336.

This brings us to the single question, whether the said Phœbe ever took a vested interest in this estate.

The proposition is deducible from the authorities, especially from the more recent English authorities, that no estate will be held contingent, unless very decided terms of contingency are used in the will, or it is necessary to hold the same contingent in order to carry out the other provisions or implications of the will : 2 Redf. Wills 606.

If the testator had stopped with directing the trustees to pay over the estate to his daughter on arriving at eighteen or marrying, it is clear on all the authorities that the legacy would have vested on the happening of either of those events, if not before ; and so it comes to this, whether the discretionary clause makes any difference. We think it does not, both on the construction of the will, and on authority.

When a man sits down to dispose of his property by will, it is fair to presume that he does not intend to die intestate, nor to become intestate after death, and so courts lean against intestacy. Now here the testator made no bequests over except in the single event of his daughter's dying *before* eighteen. If, then, she did not take a vested interest at least *at* eighteen, the testator became intestate at her death, and his estate is left to be distributed by law ; for it would be absurd to read this will as giving bequests over in case his daughter died *after* eighteen, as she did. Then again, the very fact that he made no disposition over in case she died *after* eighteen, is a circumstance of no little weight to show that he intended his estate to vest in her at all events on her becoming eighteen : 2 Redf. Wills 606. In England a gift over in one event is generally regarded as favoring vesting in all other events, on the ground that the gift over being made to depend upon particular events, the presumption is that in every other event the estate was intended to remain in the first taker. But we think, as said by Judge REDFIELD, that this form of argument is more forcible when there is no disposition over, for then it may well be said that the testator intended the estate to vest in the last donee named.

The trustees were the brothers and a brother-in-law of the testator. He made them his executors, and, reposing confidence in them, was willing to leave it to them, as trustees, to say *when and to what extent* his daughter, after becoming eighteen or marrying, should be permitted to come into the actual possession and enjoyment of his estate ; but we do not think he intended to leave it to them to say whether she should ever have it at all, or not, in interest.

He had willed it "*in trust for her*," and the discretionary clause, treating it as valid—but as to which see Gray, Perp., sect. 120—was inserted for her supposed benefit, and more by way of giving directions to the trustees as to the time and manner of payment than as importing condition or contingency. And this idea of a trust is important, and well nigh decisive of the case. The remarks of Lord Chief Justice TURNER on this subject, in *Oddie v. Brown*, 4 DeG. & J. 179, 193, are exceedingly pertinent. He says: "When, as in this case, funds are given to trustees to be held by them upon trusts, directions must, of course, be given to them as to the time and manner in which they are to deal with the funds in favor of the persons for whose benefit they are intended. Words, therefore, that in other cases might import condition or contingency, may, in such cases, be used for a wholly different purpose, namely, for the purpose of conveying the necessary directions to the trustees. The court, therefore, in such cases, looks, I apprehend, more to the substance of the gift than to the words in which it is expressed. It considers for whose benefit it was made—who were intended to be the *cestuis que trust*." And the same idea is brought out by Lord COTTENHAM, in *Saunders v. Vautier*, 1 Cr. & Ph. 240, where he says: "It is argued that the testator's great-nephew does not take a vested interest in the East India stock before his age of twenty-five, because there is no gift but in the direction to transfer the stock to him at that age. But is that so? There is an immediate gift of the stock; it is to be separated from the estate and vested in trustees; and the question is whether the great-nephew is not the *cestui que trust* of the stock. It is immaterial that these trustees are also executors; they hold the stock as trustees, and the trust is, to accumulate the income until the great-nephew attains twenty-five, and then to transfer the stock and the accumulated interest to him. There is no gift over, and the stock either belongs to the great-nephew or will fall into the residue in the event of his dying under twenty-five. I am clearly of opinion that he is entitled to it." It is not enough to say that the Court of Chancery would not have controlled the judgment and discretion of these trustees further than to have compelled an honest exercise thereof, according to *Bacon v. Bacon*, 55 Vt. 243; *Sharon v. Simons*, 30 Id. 458; *French v. Davidson*, 3 Mad. 396; and *Walker v. Walker*, 5 Id. 424; for that is quite another question from saying whether this legacy vested, and is not at all determina-

tive of it, for the legacy might have vested and yet the legatee not have been entitled to the possession and full enjoyment of it.

We have carefully examined all the cases cited in argument, and many others, but shall not attempt to review them all. The first case to which we desire to call attention is *Churchill v. Lady Speake*, 1 Vern. 251, which was this: Prideaux, plaintiff's grandfather, bequeathed to his wife a mortgage of 1000*l.*, desiring her to give 500*l.* of it to the plaintiff, "but for the time and manner of doing it" he left "it freely to herself, and as she shall see it best for her." The testator died about 1664, the plaintiff then being about nine years old. Mrs. Prideaux, plaintiff's grandmother, lived till 1683, when she died, making the Lady Speake her executrix, having paid no part of the 500*l.*, neither was the same in all that time so much as demanded of her. Plaintiff's bill was to have this legacy of 500*l.* paid to her, with interest; and the lord keeper, notwithstanding there was no demand proved, and though the testator left the time and manner of paying to his wife, decreed the 500*l.*, with interest, from the death of the testator, being near twenty years. A note to the case says, that the court was fully satisfied that the nature of the case was a trust in the grandmother for the plaintiff.

In *Hone's Executors v. Van Schaick*, 20 Wend. 564, the testator gave \$6000 to each of his grandchildren who should be living at the time of his death, to be paid to them respectively on attaining the age of twenty-one or marrying; such payment, however, not to be made *without the approbation* of the parents of such grandchildren expressed in writing; and it was held that the legatees severally took a vested interest immediately on the death of the testator. Mr. Justice BRONSON, speaking for the court, said, if the testator had stopped after directing the legatees to be paid on attaining twenty-one or marrying, the legacies would clearly have been vested, and that the clause requiring the approbation of the parents made no difference; that it provided for only a future postponement of the time of payment; that the gift was still absolute, and referred to *Churchill v. Lady Speake*, 1 Vern. 251, as authority. It is true that case is a little different from this, for there the gift was directly to the legatees, while here it is contained in the direction to pay; but Vice-Chancellor WIGRAM says that the court never intended to decide that the gift of a legacy under the form of a direction to pay at a future time or on a given event, was less

favorable to vesting than a simple and direct gift of a legacy at a like future time or on a like event, but has intended only to assimilate those cases to each other, and to distinguish both from the class of cases in which there has been a gift of a legacy and also a direction to pay at a future definite time distinct from the gift: *Leeming v. Sherratt*, 2 Hare 14, 18.

Millard's Appeal, 87 Penn. St. 457, is much in point. There the testator willed to his executrix \$30,000 in trust, to be put at interest, and to pay over the interest from time to time, when and as received, unto his nephew, Joseph M. Millard; and in case the said Joseph should be sober and industrious in his habits, the executrix was authorized "to pay over to him from time to time such portions of the principal as she, in her judgment, shall deem right and proper, or she may, at any time she may deem it right and proper, pay over to him the whole of the said \$30,000. In the exercise of the discretion thus conferred upon her, the executrix had paid to the said Joseph a little more than \$4000 of the principal when he died, leaving a widow, the appellant, and one daughter, Margaret Blanche Millard, and this appeal was taken from a decree dismissing exceptions filed to the executrix's final account as trustee of said fund, on the ground that she had not therein charged herself with the balance of the principal in her hands, and it was held that the legacy vested. The court said that plainly the testator intended to give the entire beneficial interest to his nephew, and that the discretionary clause in no wise affected the question of intent, but was designed to provide for the nephew, and at the same time to prevent the fund from being wasted through idleness or intemperance; that as the condition on which the principal was to be paid had become impossible of performance by the death of the nephew, and as the trustee could not keep the money, and there was no gift over, and it did not pass under the residuary clause, either the testator died intestate as to this fund, or it must go to the personal representative of the nephew; that the court regarded the question as free from doubt, but said, if it did not, it would feel bound to apply the rule favoring vested rather than contingent estates, primary rather than secondary intent. The court, indeed, laid stress on the fact that there was an absolute gift of the income, and said that a gift of the income of a fund without limitation of time was a gift in perpetuity and carried the fund itself; and if we were to adopt plaintiff's theory as to the non-vesting of this legacy

on other grounds, and follow some recent and very respectable English authorities—which we do not find it necessary to do in order to sustain our judgment—we should have that precise element in this case, namely, a gift of the income of the entire estate without limitation as to time. Thus, in *Fox v. Fox*, L. R., 19 Eq. Cas. 286, there was a discretionary power in the trustees to apply the whole income of the fund, or so much thereof as they might, from time to time, think proper, for the maintenance and education of the legatees until their shares became payable, which was at twenty-one, and the question was whether there was a gift of the whole income, within the rule laid down in *Watson v. Hayes*, 5 My. & Cr. 125, and other cases, that a legacy which, upon the terms of the gift, would be contingent on the legatees, attaining a certain age, may become vested by a gift of the interest in the meantime, whether directly or in the form of maintenance, provided it be the *whole* interest; and it was held, on the authority of *Harrison v. Grimwood*, 12 Beav. 192, that it was a gift of the *whole* income, followed by a discretion to apply less than the whole, and consequently, that the legacy vested, “and not the less so because there was a discretion conferred on the trustees to apply less than the whole income or that purpose.”

So in *Rouse's Estate*, 9 Hare 649, there was a gift of a legacy in trust, to apply so much of the interest thereof as the trustees should think proper in the maintenance of the testator's grandson until twenty-one, and then to pay the whole interest to him for life and, on his death, to stand possessed of the legacy and interest and all accumulations in trust for his children, with remainder over in default of children, and it was held that the provision for maintenance of the grandson during minority, out of the interest, showed that the interest was intended for him; that the legacy vested in interest though not in possession before he became twenty-one; and that he was entitled to the interest that accrued during his minority, and was not applied to his maintenance; and *Wynch v. Wynch*, 1 Cox 433, was regarded as strong authority on the point. There, a father gave legacies to his daughters, payable at twenty-one or marriage, but he made provision for their maintenance in the meantime out of another fund; and it was held that the legacies did not carry interest until the time of payment. But the Master of the Rolls said, if maintenance had been payable *out of* the interest of

the legacies, he should have thought the daughters entitled to what they claimed.

None of the cases referred to by the plaintiff are at all in conflict with the views here expressed.

In *Pink v. DeThuissey*, 2 Mad. 157, the executor was directed to give the legatees the principal of the legacy "only in case of an establishment or acquisition for him which seems advantageous to my executor, this disposition being an essential condition of the legacy I make to the said" legatees; and it was held, taking the whole will together, that as to the principal of the legacy, the intention was to give it on condition and not absolutely.

In *Malcolm v. O'Callaghan*, 2 Mad. 349, the testator gave 2000*l.* to his two daughters, to be paid on marriage, with consent of his executors, and if either died before twenty-five or marriage with consent, her legacy went to the other. One married before twenty-five without consent, and it was held that the intent was clear to make marriage with consent a condition precedent, and that, there being no bequest over, the condition must be complied with in order to entitle her to claim the legacy: *Atkins v. Hiccocks*, 1 Atk. 500, is to the same effect.

Judgment affirmed, and ordered to be certified to the Probate Court.

All concur.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹

SUPREME COURT OF ARKANSAS.²

SUPREME COURT OF FLORIDA.³

SUPREME COURT OF GEORGIA.⁴

SUPREME JUDICIAL COURT OF MAINE.⁵

ACTION. See *Bills and Notes*.

AGENT.

Implied Authority to Collect—Notice—Bill-head.—An agent who has

¹ Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term, 1885. The cases will probably appear in 118 U. S. Rep.

² From B. D. Turner, Esq., Reporter; to appear in 46 Ark. Rep.

³ From D. C. Wilson, Esq., Clerk. The cases will probably appear in 21 or 22 Florida Reports.

⁴ From J. H. Lumpkin, Esq., Reporter. The cases will probably appear in 73 or 74 Georgia Reports.

⁵ From J. W. Spaulding, Esq., Reporter; to appear in 78 Me. Rep.

authority to contract for the sale of chattels, has authority to collect pay for them at the time, or as a part of the same transaction, in the absence of any prohibition known to the purchaser: *Trainer v. Morison*, 78 Me.

Knowledge of this prohibition may be inferred from the circumstances of sale, or from customary usages of trade known to the parties: *Id.*

Persons dealing with an agent have a right to presume that his agency is general, and not limited, and notice of the limited authority must be brought to their knowledge before they are bound to regard it: *Id.*

The notice of the limited authority of the agent, in this case, printed at the top of the bill accompanying the goods sold, and not seen by the purchasers, is not so prominent as to hold them at fault in not observing it: *Id.*

Authority to Collect.—The rule that the authority of an agent to sell goods imports the authority to receive the proceeds of the sale, is limited to cases where there are circumstances or appearances which give color to the belief in the purchaser that the authority exists: *Meyer v. Stone*, 46 Ark.

An agent to sell goods who has possession of them and delivers them to the purchaser, has authority to collect the purchase price; but if he is merely employed to sell, and has no possession of the goods, he has no authority to receive the price; and payment to him will not discharge the purchaser unless there is a known usage of trade or course of business to justify him in making it: *Id.*

BILLS AND NOTES.

Draft obtained by Fraud—Action—Evidence.—Although the contract between the parties may have been embodied in a draft, with bills of lading attached, drawn by the defendant in favor of the plaintiff below, if the proof shows that the borrower gave it with intent to defraud the lender, and the lender became aware of the latter, it had the right to repudiate the draft as void, and sue on the account for money loaned, and to put in evidence the draft, bills of lading, letters of the drawer to the drawees, and sayings of the drawer showing or tending to show the intent to defraud: *Massengill v. First Nat. Bank*, 73 or 74 Ga.

Draft—Conditional Acceptance—Excuse of Performance of Conditions—Action.—The declaration upon a conditional acceptance must allege a performance of the condition: *Myrick v. Merritt*, 21 or 22 Fla.

An allegation of a delivery of a house and that the acceptor has been in possession, is not a sufficient allegation of performance of the conditions that the house has been "finished according to contract and delivered," upon which a draft is payable. The allegation that the plaintiff, the payee, gave the acceptor notice that he held himself ready to complete the house according to contract, or to pay her a reasonable sum for his failure if she would point out to him the deficiencies or omissions, and that she refused to do so, and that she refused to permit him to enter the house for the purpose of completing it according to contract, is not a sufficient averment of performance of the conditions named in the acceptance, whether considered alone or in connection with above allegation of delivery to and possession by the acceptor: *Id.*

If, in any case of a non-performance by a drawer of the conditions named by the acceptor in the acceptance, the payee has a right of action against the acceptor who refuses to permit him to perform the conditions which the drawer was under contract to perform, such right of action is not upon the acceptance, but is one of special action on the case for damages occasioned by the acceptor's refusal and prevention of performance by the payee: *Id.*

Draft—Acceptance—Payment without Delivery of Draft—Invalid Consideration—Compounding Felony.—The acceptor of a draft—non negotiable—may pay the same to the payee thereof, after its maturity, even though the draft be not produced and delivered up to the acceptor at the time of payment, provided the acceptor has had no notice of the transfer of the draft by the payee to a third person, and such payment would be a valid defence against the note, should suit be brought thereon against the acceptor by another person: *Johnston v. Allen*, 21 or 22 Fla.

If payment is made by the acceptor to the payee, and the draft be not delivered up at the time of payment, and suit is afterwards brought thereon against the acceptor by another holder claiming to be the transferee thereof, the burden of proof rests upon the plaintiff in the action—the defendant having proved the payment—to show that the defendant had notice of the transfer before the payment was made: *Id.*

Where a party under arrest for embezzlement gives a draft for the amount embezzled to the person from whom it was embezzled, such draft is not invalid unless it was agreed by the parties that in consideration of giving said draft the prosecution should be suppressed: *Id.*

Where a non-negotiable draft, valid in its inception, and on which the payee could have maintained an action against the acceptor, was loaned by the payee to a person under arrest for embezzlement, to enable him to compromise with the party who caused his arrest, and such draft is transferred to such party, who brings suit thereon against the acceptor, such acceptor cannot resist payment of the draft on the ground that it was transferred to the holder in consideration of his agreeing to suppress the prosecution of the person to whom it was loaned by the payee: *Id.*

COMMON CARRIER.

Delivery of Goods.—A carrier by water may deliver goods on the wharf, but generally the consignee is entitled to notice of their arrival, that he may remove or safely store them. Notice, however, may be waived by the previous course of dealing between the parties: *Turner v. Huff*, 46 Ark.

A carrier by water is not responsible for the loss of goods delivered at the landing-place at which the consignee receives his goods, though there be no warehouse there and the consignee have no notice of their arrival, if it be the uniform usage and course of business of carriers in the same trade to leave goods at the landing-place without notice and the manner of delivery conform to the custom of the locality; and this whether the shipper or consignee knew of the usage or not: *Id.*

Live Stock—Damages—Stipulation against Liability.—Carriers of live stock are liable as common carriers and as insurers to the same extent as carriers of merchandise, except as to injuries caused by the

animals to themselves or to each other; losses that are caused by their inherent vices and propensities: *St. L., I. M. & S. Ry. v. Lesser*, 46 Ark.

A common carrier cannot lawfully stipulate for exemption from responsibility for the negligence of himself or his servants, or the insufficiency of his cars for the transportation of the freight deposited in them: *Id.*

When the shipper of live stock, in consideration of reduced rates, contracts with the carrier that in case of a total loss of any of the stock, the valuation of any animal should not exceed a specified sum, then in case of a partial injury the damages will be the proportion of that sum the animal was lessened in value by reason of the injury: *Id.*

Transportation beyond Own Line—Contract—Negligence.—When the goods are received by a carrier to be transported beyond the terminus of its line, and delivered at a particular place and to particular persons at such place, without more, a contract is implied that the carrier will cause such goods thus delivered to it to be carried to the place of destination safely, without damage or hurt, and he will be liable to the consignee, for failure to perform his contract, for any damages which may arise therefrom to the party injured: *Tulvey v. Georgia Rd.*, 73 or 74 Ga.

To ascertain if any contract was made by the first carrier to transport beyond its line to the place of destination, the bill of lading may be looked to, and *aliunde* evidence may also be introduced, such as payment of all the freight to it, the way bill and designation of all the lines over which the goods are to go, and the apportionment by the first carrier of the amount which each line is to be paid: *Id.*

CONFLICT OF LAWS. See *Usury*

Administration of Decedent's Property—Decision of Foreign Probate Court—Domicile.—The personal property of a deceased person is to be administered according to the law of his domicile. The law of the country of which he is a subject regulates the succession. This law applies to mortgages on land as well as to other personalty: *Thomas v. Morrisell*, 73 or 74 Ga.

Issues passed upon by a probate court of another state cannot be reopened and inquired into again by a proceeding in our courts substantially between the same parties and involving the same issue, and there is nothing in the question of domicile to take it out of the general rule: *Id.*

CONSTITUTIONAL LAW. See *Criminal Law*.

The Fourteenth Amendment—Corporations.—The provision in the Fourteenth Amendment to the Constitution of the United States, which forbids a state to deny to any person within its jurisdiction the equal protection of the laws, applies to the Southern and Central Pacific Railroad Companies: *Santa Clara Co. v. South Pac. Rd.*, S. C. U. S., Oct. Term 1885.

Decisions of the State Courts when binding upon the Supreme Court of the United States—Distinction between Office de facto and Officer de facto.—Upon the construction of the constitution and laws of a state, the Supreme Court of the United States, as a general rule, follows the

decisions of the highest court of the state, unless they conflict with or impair the efficacy of some principle of the federal constitution, or of a federal statute, or a rule of commercial or general law; on many subjects they are necessarily conclusive, such as relate to the existence of her subordinate tribunals, the eligibility and election or appointment of their officers; and the passage of her laws: *Norton v. Shelby County*, S. C. U. S., Oct. Term 1885.

Upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby, validity is frequently given to acts of officers *de facto*, but there can be no officer *de facto* or *de jure* if there be no office to fill, and an unconstitutional act can create no office: *Id.*

Tonnage Tax—Fees under Quarantine Laws—Preference to Ports of one State over those of another.—The requirement that each vessel passing a quarantine station shall pay a fee fixed by the statute for examination as to her sanitary condition, and the ports from which she came, is a part of all quarantine systems, and is a compensation for services rendered to the vessel, and is not a tax within the meaning of the constitution concerning tonnage tax imposed by the states: *Morgan's Steamship Co. v. Louisiana Board of Health*, S. C. U. S., Oct. Term 1885.

Nor is it liable to constitutional objection as giving a preference for a port of one state over those of another. Section 9, of the first article of the constitution, is a restraint upon powers of the general government, and not of the states, and can have no application to the quarantine laws of Louisiana: *Id.*

Deprivation of Property without due Process of Law—Sale of Real Estate by Guardian—Failure to enter Bond.—In an action of ejectment the judgment turned on the validity of a sale of land by the guardian of the plaintiff. It appeared that all proceedings for the sale were regular, save that no bond was entered by the guardian, as the statute provided, which the Court of Common Pleas held did not avoid the sale. This judgment was affirmed on appeal to the District Court. The case was then taken to the State Supreme Court, it being averred, among other assignments of error, that the plaintiff in error was deprived of his property without due process of law, contrary to the provisions of the Fifth Amendment of the Constitution of the United States. The Supreme Court, while affirming the opinion of the District Court, took no notice of this assignment. *Hell*, that the judgment, nevertheless, involved the decision of the question whether there had been a denial of the right so claimed; and therefore the Supreme Court of the United States had technical jurisdiction; but the judgment was so clearly correct that the motion to affirm should be granted. The failure to enter the bond was at most an error of the court. A state cannot be deemed guilty of a violation of the constitutional obligation referred to because one of its courts, while acting within its jurisdiction, has made an erroneous decision: *Arrowsmith v. Harmoning*, S. C. U. S., Oct. Term 1885.

CONTRACT. See *Bills and Notes*.

Liquidated Damages—Partnership.—One partner agreed in writing to sell to a co-partner his interest in the company's property, the pro-

perty consisting of a store and stock of goods (furniture) therein, and some other personal property, the whole worth about twenty-five thousand dollars, the sale to be at cost for most of the property, the balance to be taken at an appraisal if the parties could not agree on its value, the terms of the sale to be cash on delivery, and either party who should break the contract was to forfeit to the other the sum of five hundred dollars: *Held*, That the five hundred dollars were intended by the parties to be liquidated damages: *Maxwell v. Allen*, 78 Me.

CRIMINAL LAW. See *Errors and Appeals*.

Accomplice—Evidence.—An accomplice is a competent witness, and a conviction may be had upon his uncorroborated testimony if it satisfies the jury beyond a reasonable doubt: *Bacon v. State*, 21 or 22 Fla.

There is no such inflexible rule of law as that no person can be convicted on the testimony of an accomplice unless corroborated by other evidence. It is a question for the jury who pass upon the credibility of an accomplice, as they do upon that of every other witness. The statements of the accomplice should be received with great caution, and courts should always so advise the jury, but if the testimony carries conviction, and the jury are convinced of its truth, they should give to it the same effect as would be allowed to that of a witness who is in no respect implicated in the offence: *Id.*

Evidence—Accomplice.—It is not error to charge that, if a witness sworn in the case is an accomplice, his testimony without more cannot convict, but if the jury believe from the evidence that the witness was not an accomplice, then his evidence alone may convict; and this would be true though he was charged in the indictment with the crime, and his own testimony alone showed he was not an accomplice, and though he was present, if that presence was constrained, or he was enticed to be there by a false claim of defendant and another to the property and an anticipated lawsuit about it: *Bernhard v. State*, 73 or 74 Ga.

Principal and Accessory—When latter may be tried.—A plea of guilty by the principal offender, received and recorded, though sentence is not pronounced, is in all essential respects equivalent to a verdict of guilty returned and entered on the minutes, and is such a conviction of the principal as authorizes the court to proceed with the trial of an accessory: *Groves v. State*, 73 or 74 Ga.

It is true that the plea, before sentence can be withdrawn, and that a verdict can only be arrested, or set aside for cause shown, whether a judgment has been rendered on it or not. Still, so far as resorted to for the purpose of showing the guilt of the principal, *prima facie* in order to bring on the trial of the accessory they stand on the same footing: *Id.*

Privilege of Counsel—Time for Preparation.—The constitutional provision that every person charged with an offence shall have the privilege of counsel, would amount to nothing if counsel for the accused were not allowed sufficient time to prepare his defence: *Blackman v. State*, 73 or 74 Ga.

Where the crime charged was murder, committed early in September,

and the court met on the fourth Monday of the same month, the bill of indictment found on Tuesday and on Wednesday, the court assigned the accused counsel, and announced it would take up the case on Friday thereafter, and counsel asked for a continuance, as they had not had time to confer with the prisoner and prepare his defence, he having been brought from the jail of another county late on Thursday evening before, the continuance or a postponement to a later day should have been granted : *Id.*

DAMAGES. See *Contract*.

Counsel Fees and Expenses.—Expenses of litigation do not fall under the head of punitive or vindictive damages, but stand by themselves : *Moseby v. Sanders*, 73 or 74 Ga.

They may be recovered when the defendant has caused the plaintiff unnecessary trouble and expense : *Id.*

DEBTOR AND CREDITOR.

Application of Payments.—It was shown that Holley owed H. & G. a debt which he had given a mortgage to secure ; that H. & G. purchased other notes of his without his knowledge, and that he sent them cotton to be credited on his indebtedness ; it is most manifest that he intended to pay the mortgage debt, and this being so, the payment should have been so applied : *Holley v. Hardeman*, 73 or 74 Ga.

DOMICILE. See *Conflict of Laws*.

EQUITY. See *Usury*.

Practice—Answer—Evidence.—An answer upon oath, to a bill in equity, that does not call for answer upon oath, does not operate as evidence of the facts stated in it : *Clay v. Towle*, 78 Me.

Reformation of Contract.—Chancery will not reform a promissory note payable *in futuro*, with ten per cent. interest from date, by adding the words "until paid," though the parties intended it to bear that interest after as well as before maturity, if they omitted the words only because they thought them unnecessary. A contract written as the parties intended it to be written cannot be reformed for their mistake of its legal effect : *Rector v. Collins*, 46 Ark.

ERRORS AND APPEALS.

Criminal Law—United States Supreme Court—Twice in Jeopardy—Practice.—The Supreme Court of the United States has jurisdiction to review the judgment of a state court denying that defendant is entitled to immunity from a second trial for the same offence by reason of Art. V. of the Amendments of the Constitution of the United States : *Bahanan v. Nebraska*, S. C. U. S., Oct. Term 1885.

Upon a motion to dismiss, this court cannot consider the merits of the question on which its jurisdiction depends, unless there is also a motion to affirm : *Id.*

EVIDENCE. See *Criminal Law*.

Receipt given under Protest.—A receipt is only *prima facie* evidence of what it imports, and may be explained or contradicted by the party

signing it; but a settlement and receipt in full of an unliquidated demand, when made with a complete knowledge of all the circumstances, is a bar to a subsequent action upon the demand, although the creditor accepts the amount paid under protest, and threats of suit for a balance claimed to be due him: *Springfield & Memphis Rd. Co. v. Allen*, 46 Ark.

EXECUTOR AND ADMINISTRATOR.

Bond of Executor—Right of Administrator d. b. n. to Sue.—An administrator *de bonis non* is officially interested in his predecessor's bond, to the extent of the unadministered assets; and he may originate a suit on it, provided his interest has been specifically ascertained; otherwise he must have authority from the judge of probate, to bring the action, and cannot rely, therefore, on an authorization given to another person. In either case he must allege such facts in the writ, as will authorize him to bring and maintain the action: *Waterman v. Dockray*, 78 Me.

EXEMPTION. See Surety.

Partnership Property—Time.—The members of an insolvent firm are not entitled to the exemptions allowed by law, out of the partnership property, after it has been seized to satisfy the demands of the creditors of the firm: *Richardson v. Adler*, 46 Ark.

The right to exemption, as head of a family, must exist at the time the creditor's lien attaches. To become a head of a family after an attachment is levied on the property, will not exempt the property from sale under a judgment of condemnation. The judgment lien relates to the levy of the attachment, and perfects the inchoate charge created by the levy, and cannot be displaced by any change in the status of the debtor: *Id.*

GUARANTY.

When acceptance not Necessary—Discharge of Guarantor.—An instrument in writing, appended to a paper purporting to be a bill for merchandise, sold by one Stultz to one Powers, in the following words: "In consideration of seven and a half per cent., I guarantee the above bill to the amount of two hundred dollars. (Signed) A. Solary," which was written by Stultz, and presented by him to Solary for his signature as the conclusion of a negotiation between them, and is signed by Solary and delivered to Stultz, is a guaranty, and not an offer to guarantee, which would require acceptance by the beneficiary, and notice thereof to the guarantor: *Solary v. Stultz*, 21 or 22 Fla.

An agreement by the creditor to extend the time of payment of the debt guaranteed sixty days upon the debtor paying him a sum of money he owed him on another transaction, is not based on a good consideration, and will not discharge the guarantor: *Id.*

GUARDIAN AND WARD. See Constitutional Law.

HIGHWAY.

Right to plant Trees.—The owner of land upon a public way, may lawfully plant ornamental or shade trees, within the limits of the way, if the public use is not thereby obstructed or endangered: *Wellman v. Dickey*, 78 Me.

Trees so planted are a public benefit, and cannot be destroyed without the call of public necessity : *Id.*

Highway surveyors, who destroy such trees without reason or necessity, are trespassers, and if the act is wanton, they are liable for exemplary damages : *Id.*

INJUNCTION.

Municipal Corporation—Usurpation of Franchise.—A bill in equity, and an injunction issued thereon, is not the proper remedy where a municipal corporation has been organized, even though it is alleged that such organization was illegal, and that it was not so organized in conformity to the law : *McDonald v. Rehner*, 21 or 22 Fla.

When a franchise or an office is usurped, an injunction will not lie to prevent such usurpation, even though the respondents have not entered upon the duties of their office. The remedy is at law, by *quo warranto* to be invoked after entry into, or exercise of authority under and by virtue of their election or appointment : *Id.*

Alleged Conspiracy to destroy a Business—Overt Acts—Remedy at Law.—Complainant's bill alleged that he was part owner of a pilot boat; that the captain and other officers of the vessel were duly commissioned as pilots, and that all legal regulations had been complied with; and that the defendants had combined together for the purpose of destroying his business and property by publications in the newspapers, and by divers and sundry suits (mentioning three). The bill also alleged that defendants had formed a pretended partnership, and bound themselves not to serve as branch pilots in a certain district with those outside of the confederation, and that these acts would injure plaintiff's business. The bill prayed for an injunction. *Held*, that the whole gist of the complaint was that the defendants did not treat the plaintiff as having a right to use his vessel as a pilot boat, and had publicly so stated, and that some of the parties mentioned had been subjected to suits for their acts in piloting; and that plaintiff had a full remedy at law : *Francis v. Flinn*, S. C. U. S., Oct. Term 1885.

INTEREST. See *Usury*.

LICENSE.

Pedler—Lightning-Rod Vendor.—One who travels through the country, carrying with him all the tools, ladders, &c., necessary to putting up and repairing lightning-rods, charging a certain amount per foot for rods, and a certain amount for putting them up (never having sold any without putting them up), and soliciting patronage from house to house, is not a pedler and subject to penalty for failing to take out county license, as such, in the sense of the law : *Ezell v. Tharsher*, 73 or 74 Ga.

He does not simply sell rods from house to house, which would make him a pedler, but he affixed rods to houses and expended skill thereon, and is rather a skilled mechanic than a pedler : *Id.*

LIMITATIONS, STATUTE OF.

Fraud—Purchase by Administrator—Equity.—A purchase of an intestate's lands at an administrator's sale, by an agent of the adminis-

trator and with his means, who takes the deed in his own name and conveys to the wife of the administrator, is fraudulent, and though not void, the purchase and deeds may be avoided by any one interested in the lands: *McGaughey v. Brown*, 46 Ark.

Courts of equity, in cases of concurrent jurisdiction, consider themselves bound by Statutes of Limitations which govern courts of law in like cases, and this rather in obedience to the statute, than by analogy: *Id.*

The rule that the Statute of Limitations will not bar a trust, applies only to express and positive trusts, and not to them where circumstances exist which raise a presumption of the extinguishment of the trust, or where there is an open denial or repudiation of the trust brought home to the knowledge of the parties in interest, which requires them to act as upon an asserted adverse title: *Id.*

The Statute of Limitation will commence against an action for the frauds of an administrator, from the time of his discharge by the probate court: *Id.*

MANDAMUS.

Alternative Mandamus—Municipal Corporation—Levy of Taxes.—If an alternative writ of mandamus shows a *prima facie* case, it is not demurrable: *State v. Mayor and Aldermen of Jacksonville*, 21 or 22 Fla.

Where the writ alleges a power in a municipal body to levy taxes, and such power is limited by statute to a certain percentage upon the value of the taxable property, it is not necessary to allege in the writ that the power has not been exhausted. The exhaustion of the power by a previous exercise of it is properly matter of defence to be set forth by the officers who are called upon to exercise the power: *Id.*

Where a levy of taxes is desired by a judgment creditor of a municipality for the payment of his claim, and his right is based upon the ordinary status of a judgment creditor and the power of the board of aldermen to make a levy, a demand upon the proper officers for a levy to pay the judgment must be made before relief by mandamus can be had: *Id.*

MASTER AND SERVANT. See *Municipal Corporation ; Telegraph.*

Defective Machinery.—A master's liability for an injury to his servant, caused by defective machinery furnished by the former for the latter's use, is not absolute: *Hull v. Hall*, 78 Me.

To render the master liable for an injury to his employee, caused by defective machinery furnished by the former for the latter's use, it must appear that the master knew, or by the exercise of proper diligence, ought to have known of its unfitness, and that the servant did not know, or could not reasonably be held to have known of the defect: *Id.*

Railroad—Employment of Physician by Road Master—Ratification.—A road master of a railroad company, or a conductor on a train, are not so far agents of the railroad company as to be legally authorized to employ physicians or surgeons to attend upon an employee who is injured by the cars of the company, unless they are specifically charged with that duty: *Peninsular Rd. v. Gary*, 21 or 22 Fla.

The conductor's direction to the physician or surgeon to extend such

medical aid, or his promise that the same when rendered shall be paid for by the company, do not render such company liable for the same, unless there is proof that he is authorized so to do : *Id.*

A contract by a road master, conductor or other agent without authority, may be ratified by the corporation, and so become binding upon it : *Id.*

The action of the general manager may, by his ratification of such a contract made by a subordinate agent, render the corporation liable thereon : *Id.*

MORTGAGE.

Ejectment.—A mortgage will not sustain a recovery in an action of ejectment against the holder of the legal title, nor will a deed of conveyance made by a master under a decree in a suit to which the person owning the legal title at the institution of the suit was not a party : *Berlack v. Halle*, 21 or 22 Fla.

Certainty in Description.—Though usual, it is not necessary that a mortgage state the amount of the debt to be secured, or that it is evidenced by a note or any other instrument. If it contains a general description, sufficient to embrace the liability intended to be secured, and to put a person examining the records upon inquiry, and to direct him to the proper source for particular information of the amount of the debt, it is sufficiently certain : *Curtis v. Flinn*, 46 Ark.

MUNICIPAL CORPORATIONS. See *Injunction* ; *Mandamus*.

Negligence—Fire Department.—The officers of the fire department of a municipality are public officers, and not the mere servants or agents of the municipality : *Burrill v. City of Augusta*, 78 Me.

A city is not liable for the act of the officers of its fire department, unless made so by express statute, or unless the act complained of was expressly ordered by the city government : *Id.*

NEGLIGENCE.

Burden of Proof of Contributory — Railroads — Platforms and Grounds—Conduct of Party after the Injury.—If the plaintiff, in any case of personal injury, can show negligence on the part of the defendant without, at the same time disclosing the inherent weakness of his own case by reason of contributory negligence, then such contributory negligence is matter of defence, in confession and avoidance, and must be established by a preponderance of testimony by the defendant : *Texas, &c., Ry. v. Orr*, 46 Ark.

As a general rule railroad companies are bound to keep in a safe condition all portions of their platforms and approaches thereto to which the public do or would naturally resort, and all portions of their station grounds, reasonably near to the platform, where passengers or those who have purchased tickets to take passage on the cars, or those debarking from them would naturally or ordinarily be likely to go, and especially by those routes and methods which the company has established by its own customs and practice : *Id.*

That an injured party does not adopt the best remedies, or follow implicitly the directions of his physician, will not excuse a wrongful injury

which produces as its direct effect, a disease from which death ensues. The law fixes no exact standard here, and it should be left to the jury as to the reasonableness of his conduct, and whether or not the death was caused by the injury: *Id.*

Railroads—Passengers waiting at Station.—Contributory Negligence—Jumping from a Moving Train.—A person waiting at a railroad station for passage upon a train soon to depart, who is invited by the ticket agent to sit in an empty car standing on the side track while the station room was being cleaned, is entitled to the same protection from the company while in the car as if in the regular waiting room; in either place the person is a passenger in the care of the company: *Shannon v. Boston & Albany Rd.*, 78 Me.

For a passenger to jump upon or off of a moving train is *prima facie* negligence; if injured thereby, it is incumbent on him, in an action against the railroad, to prove a reasonable excuse for the act: *Id.*

Whether a passenger had or not a reasonable excuse for jumping upon or off of a moving train is usually a question for the jury: an extreme case either way may be determined by the court. Fear of personal danger is not the only excuse that will exonerate one in jumping from a moving train. A passenger may in some cases be justified in alighting from a moving train merely to save himself from serious inconvenience; it all depends upon the speed of the train and the attendant circumstances: *Id.*

Stock falling in Pit on Neighbor's Premises.—The defendant dug a pit under his cotton gin for a cotton-press, near the public highway, and left it unenclosed, and corn and cotton seed scattered about it. The plaintiff's cow fell into the pit and was killed. *Held*, that the defendant was guilty of negligence and must pay the value of the cow; and that the plaintiff was not guilty of contributory negligence in turning his cow out on the commons remote from the gin: *Jones v. Nichols*, 46 Ark.

OFFICER.

Change of Salary by smaller Appropriation.—Interpretation by Statutes.—Implied Repeal.—A statute fixing the annual salary of a public officer at a named sum, without limitation as to time, should not be deemed abrogated or suspended by subsequent enactments which merely appropriate a less amount for the services of that officer for particular fiscal years, and which contain no words that expressly or by clear implication modify or repeal the previous law: *United States v. Fisher*, 109 U. S. 143; and *United States v. Mitchell*, *Id.* 146, distinguished: *United States v. Langston*, S. C. U. S., Oct. Term 1885.

PARTNERSHIP. See *Contract*; *Exemption*.

RAILROAD. See *Common Carrier*; *Master and Servant*; *Negligence*; *Tax and Taxation*.

Crossings—Land Damages—Constitutional Law.—In assessing damages to be recovered by a railroad corporation against a town for its land taken by locating town ways across its track, the jury may take into consideration, in order to ascertain present value, not only the use which the railroad now makes of its located limits at the crossings, but what use it may reasonably be expected it will in the near future make of the

same: *Portland and Rochester Rd. Co. v. Inhabitants of Deering*, 78 Me.

It is not an unconstitutional exercise of legislative power to require a railroad corporation to build and maintain highway crossings laid out over its track, so far as such crossings are within its located limits, although the law imposing such burden was enacted since the railroad was built, the company being subject to the general laws of the state in existence when its charter was granted and such as should be thereafter passed: *Id.*

Damages are not recoverable, by a railroad company against a town which has laid out ways over its track, for the interference and inconvenience occasioned to its business by the opening of the new ways, nor for any increased risks or increased expense in running its trains caused thereby: *Id.*

Power to make Lease or other Contract of Control—Effect of such Contract when Ultra Vires.—Unless specially authorized by its charter or aided by some other legislative action, a railroad company cannot, by lease or other contract, turn over to another company, for a long period of time, its road and all its appurtenances, the use of its franchises, and the exercise of its powers, nor can any other railroad company, without similar authority, make a contract to run and operate such road, property and franchises of the first corporation. Such a contract is not among the ordinary powers of a railroad company, and is not to be inferred from the usual grant of powers in a railroad charter: *Thomas v. Rd. Co.*, 101 U. S. 91, reaffirmed: *Penn Co. v. St. Louis, Alton, &c., Rd.*, S. C. U. S., Oct. Term 1885.

The doctrine that acts may be done and property change hands, under void contracts which have been fully executed, with which courts will not interfere, is sound, but any relief in such cases must be based on the invalidity of the contract, and not in aid of its enforcement. While the plaintiff in this case might recover, in an appropriate action the rental value of the use of its road against the lessee company, the other defendants who had received nothing, but had been paying out money under a void contract, cannot be compelled to pay more money under the same contract: *Id.*

SALE.

When Title passes—Trover.—Flour was ordered by brokers for Dub & Co., with this direction: "Ship as soon as you can, forty-five days draft, to B. Dub & Co." Dub & Co. assigned it to Matthewson, as their assignee, without returning the draft signed, it being sold with the bill of lading and an invoice stating the terms as forty-five days of acceptance. *Held*, the giving of the acceptance was a condition precedent to the acquisition of title by B. Dub & Co., and the sellers of the flour might maintain trover therefor against the assignee: *Matthewson v. Belmont Co.*, 73 or 74 Ga.

SET OFF.

Purchase by Factor in own Name.—If a factor sell in his own name, as owner, and does not disclose his principal, and acts ostensibly as the real owner, although the principal may afterwards bring his action upon the contract against the purchaser, yet the latter, if he *bono fide* dealt

with the factor as owner, will be entitled to set off any claim he may have against the factor in answer to the demand of his principal: *Ruan v. Gunn*, 73 or 74 Ga.

STATUTE. See *Officer*.

SURETY. See *Guaranty*.

Exemption—Presumption as to Funds in hands of Defaulting Officer.—The security on the bond of a defaulting county treasurer, against whom an execution has issued for funds belonging to the county in the hands of the treasurer, cannot take a homestead, which will exempt his property from the debt incurred by reason of his obligation on the bond: *McWatty v. Jefferson Co.*, 73 or 74 Ga.

The presumption would be that the funds in the hands of the treasurer arose at least in part from taxes, and no evidence was offered by the surety in this case that the fund or any part of it came from other sources, though the treasurer, his principal in the bond, was bound to keep a correct record of all funds received by him and the source from which they came: *Id.*

TAX AND TAXATION.

Assessment including Property not Legally Assessable—Railroads—Fences not part of the Roadway—An assessment of different kinds of property, as a unit, which includes property not legally assessable by the Assessment Board, and in which the part of the tax assessed against the latter property, is not separable from the other part is invalid, and will not support an action for the recovery of the entire tax so levied: *Santa Clara County v. South Pacific Rd.*, S. C. U. S., Oct. Term, 1885.

The fences erected upon the line of a railroad, between its roadway and the land of conterminous proprietors, cannot be assessed under the head of "roadway": *Id.*

TELEGRAPH.

Damages—Contract.—A verbal contract that the plaintiff should labor for a manufacturer at two dollars and twenty-five cents per day, commencing Monday, September 1st, but for no stipulated period, is defeasible at the will of either party, and a telegraph company is liable, for nominal damages only, in not delivering a telegram to the plaintiff, seasonably notifying him of the terms of the contract, whereby he lost all benefit from it: *Merrill v. Western Union Tel. Co.*, 78 Me.

TRIAL.

Evidence—Personal Examination of Party for Personal Injury.—Where a plaintiff in an action for personal injuries alleges that they are of a permanent nature, the defendant is entitled, as a matter of right, to have the opinion of a surgeon upon his condition, based upon personal examination; and the court should, upon demand of the defendant, compel the plaintiff to submit to such examination. But where the evidence of experts is already abundant, the court must exercise its sound discretion in compelling or refusing the examination; and its action is subject to review in case of abuse: *Sibley v. Smith*, 46 Ark.

TRUST AND TRUSTEE.

Creation of Trust—Presumption as to Interests of Beneficiaries.—Sect. 5573, Howell's Stat. Michigan, provides that "express trusts may be created," * * * "for the beneficial interest of any person or persons, when such trust is fully expressed and clearly defined upon the face of the instrument creating it, subject to the limitations as to time prescribed in this title :—" *Held*, that the letters, statements and agreements, which passed between the plaintiff and defendant, as evidence in this case, are sufficient to establish an express trust within the meaning of the statute. The objection that the individual interests of the respective beneficiaries are not stated, is met by the rule, which prevails in Michigan, as in all other states where the principles of the common law are observed, that where a conveyance of land is made to two or more persons, and the instrument is silent as to the interest which each is to take, the presumption will be that their interests are equal : *Loring v. Palmer*, S. C. U. S., Oct. Term 1885.

USURY.

What Amounts to Relief in Equity.—*Presumption as to Laws of Another State.*—It is not usury to add the interest on several notes to the principal, and then add to this sum the interest on it at ten per cent. per annum for one year, and then take a new note for this last sum payable one year after date, with interest at ten per cent. per annum after maturity, in payment of the old notes : *Grider v. Driver*, 46 Ark.

It is not usury for one to sell property on a credit for a higher price than he would have sold for cash, with legal interest added ; but if the sale be really made on a cash estimate, and time be given to pay the same, and an amount is assumed to be paid greater than the cash price with legal interest would amount to, this is an agreement for forbearance that is usurious : *Id.*

A plaintiff will not be relieved in equity from a usurious contract except upon condition that he pays the principal and legal interest : *Id.*

Although it will be presumed in many cases, in the absence of a contrary showing, that the laws of other states are the same as our own, the presumption will not be indulged where our laws impose a penalty or work a forfeiture as in the case of usury : *Id.*

Excessive Interest Paid after Maturity of Debt.—Where the maker of a promissory note payable in futuro, with 10 per cent. interest from date, omitting the words "until paid," pays that rate of interest after the maturity of the note, he cannot recover the excess paid over 6 per cent. accruing after maturity : *Rector v. Collins*, 46 Ark.

VENDOR AND VENDEE.

Purchase by Vendee of Outstanding Incumbrance.—If a vendee of land remaining in possession, buys in an outstanding incumbrance, he will not be permitted to set up an adverse title under it. The purchase enures to the benefit of the vendor's title, and the vendee can only abate the unpaid purchase-money, or in case he has paid this, recover the amount he has expended by action on the covenant broken or other proper remedy : *Bush v. Adams*, 21 or 22 Fla.

WITNESS. See *Criminal Law*.

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INCOME BONDS AND MORTGAGES.

SECT. 1. *Income bonds defined ; forms of.*

Corporate income bonds are those payable out of the net income of the corporation. In form they may be various. They may in terms be negotiable, as where they are payable to bearer or order ; or they may be unnegotiable in form, as where they are payable to the obligee without terms of negotiability. They may be payable only out of net income, in which case, if there is no net income, there would be nothing to pay ; or they may be payable unconditionally, and whether there shall be net income sufficient for that purpose or not. They may bear a fixed rate of interest, or the rate may be graduated by the amount of the net earnings, or be fixed at a certain per centum of the net earnings. They may provide that interest shall be payable only out of the net income of the current year, or that, in case of arrearages from insufficiency of income of the current year, the interest be paid out of the net income of subsequent years, whenever that is sufficient for the purpose ; and they may or may not have interest-coupons attached to them.

SECT. 2. *Income bondholders lien on the income.*

Income bondholders have a specific lien upon the net income of the corporation, and such income is specifically pledged to the use of such bondholders, and it is theirs for the purpose of paying such bonds and interest, according to the terms of the bonds, as soon as it is earned : *Ketchum v. St. Louis*, 101 U. S. 306 ; *Rutten v. Union Pacific Rd.*, 17 Fed. Rep. 480 ; 16 Reporter 199 ; *Galena & Chicago Rd. v. Menzies*, 26 Ill. 121 ; *Jones on Corp.*, sect. 114.

SECT. 3. *Income bonds constitute an equitable assignment.*

Income bonds constitute an equitable assignment of the net earnings of the corporation as fast as they accrue, and a transfer of the equitable title to the holder. The income is not in existence at the time of its appropriation to the payment of the bonds, but there is an equitable assignment of the net income fund to accrue, and the general principles of equitable assignments would be applicable thereto. It is specifically pledged to the use of the bondholders as soon as it is earned: *Id.*; *Galena & Chicago Rd. v. Menzies*, 26 Ill. 121. The general doctrine on this subject, in equity, is that, if one party, by a valid agreement, appropriates to another a particular fund, arising from profits or income, this constitutes an equitable assignment of it: *Watson v. Duke of Wellington*, 1 Russ. & Myl. (Eng.) 602; *In re Strand Music Hall Co.*, 3 De G., J. & S. 147; *Lewisburgh, &c., Co. v. March*, 91 Penn. St. 26. An agreement setting apart a particular fund for the benefit of a particular creditor creates a lien in equity upon that fund, and raises a trust for the benefit of the creditor: *Ewing v. Arthur*, 1 Humph. (Tenn.) 537; *National Bank v. Coates*, 12 Reporter 514. See, also, *White Water Canal Co. v. Vallette*, 21 How. (U. S.) 414. So authority to collect calls upon corporation stock, given as security for a loan, is a good equitable assignment of it, and valid against the company's subsequent assignee in bankruptcy: *Savings Bank v. Publishing Co.*, 3 Dill. (U. S. C. C.) 287. See, also, *Pickering v. Ifrancombe Rd.*, L. R., 3 C. P. 235. So an agreement conveying railroad shares in the hands of a third party, and transferable by delivery, but subject to prior claims, is an equitable assignment of them: *Robinson v. Nesbitt*, L. R., 3 C. P. 264. This doctrine is not only applicable to assignments of corporate income, by the execution of income bonds and mortgages, but extends generally to all kinds of funds or interests existing or to be created, including the net income and profits of real estate: *Ketchum v. St. Louis*, 101 U. S. 306; *Pinch v. Anthony*, 8 Allen (Mass.) 536; *Smith v. Patton*, 12 W. Va. 541; *Legard v. Hodges*, 1 Ves. Jr. (Eng.) 477; *In re Strand Music Hall Co.*, 3 De G., J. & S. (Eng.) 147; *Power v. Bailey*, 1 Ball & B. (Eng.) 49; Story's Eq. Jur. (12 ed.) sect. 1231; Overton on Liens, sect. 32.

SECT. 4. *Distinction between income bonds and common mortgages.*

One distinction, at least, between an income bond and a common

mortgage, is that the former, transfers the income as fast as it accrues, while the latter only gives a conditional right, usually permitting the mortgagor to retain possession of the mortgaged property, and to receive the income thereof so long as he retains possession of it; and generally the mortgagee has no right to the income until he has taken possession of the mortgaged property by virtue of the mortgage; and this rule is applicable to the mortgage of a railroad company where the mortgage covers not only real estate, but the franchises, tolls, rents and profits of the corporation: *Galveston Rd. v. Cowdrey*, 11 Wall. 459; *American Bridge Co. v. Heidelberg*, 94 U. S. 798; *Boston Bank v. Reed*, 8 Pick. (Mass.) 459; Jones on Corp., sect. 114; 1 Washb. on Real Prop. 360; *Gilman v. Ill. Tel. Co.*, 91 U. S. 603; *Teal v. Walker*, 111 Id. 242. The mortgagee must take possession or have a receiver appointed and placed in possession of the mortgaged property before the rents and profits can be made available for the satisfaction of the mortgage; and until this is done the income bondholders may require the appropriation of the net income to the satisfaction of their bonds, although issued subsequently to the execution of the mortgage: Id.; *Galena & Chicago Rd. v. Menzies*, 26 Ill. 121. By taking possession under a prior mortgage, the mortgagee could prevent the application of net income to the payment of income bonds: *Gilman v. Ill. & Miss. Tel. Co.*, 91 U. S. 603.

SECT. 5. *Where income bonds are secured by mortgage.*

Income bonds may also be secured by a mortgage, in which case the mortgagee would have the benefit of both securities; but even in case of income mortgages, it has been held that there would be an implied right of the mortgagor to retain possession and receive the earnings of the mortgaged property, until the mortgagee takes possession for default. Until that time the mortgagor would have an implied right to the possession and to receive the earnings and apply them to the payment of any floating debts of the corporation, or to make improvements of the corporate property in the discretion of the directors, and within the scope of the chartered powers of the corporation; and this right of possession of the mortgagor is sometimes expressly provided for in the mortgage: *Gilman v. Ill. & Miss. Tel. Co.*, *supra*; *American Bridge Co. v. Heidelberg*, 94 U. S. 798; *Miss. Valley Rd. v. United States Exp. Co.*, 81 Ill. 534.

Before foreclosure or possession taken under a railroad mortgage

for default, even the net earnings of the company would be liable to garnishment, whatever may be the stipulations of the mortgage as to the right of possession: *Miss. Valley Rd. v. United States Exp. Co.*, *supra*; *Merchants' Bank v. Petersburg Rd.*, 24 Pitts. L. J. 192; *Bath v. Miller*, 51 Me. 341; 53 Id. 308; *Noyes v. Rich*, 52 Id. 115; *Smith v. Eastern Rd.*, 124 Mass. 154; *Ellis v. Boston, &c., Rd.*, 107 Id. 1; Jones on Corp., sects. 114, 115; 1 Jones on Mort. (3d ed.) sect. 670.

SECT. 6. *An income mortgage may provide for income before taking possession.*

A corporate mortgage may be executed without bonds and may itself provide for the appropriation of the net income to the payment of the sum secured by it, with interest, and thereby appropriate such fund, without the necessity of taking possession of the mortgaged property by the mortgagee; and in such a case there would be an equitable assignment of the fund, and a lien created thereon as fast as it accrued, the same as in case of a simple income bond. The mortgagee would have all the rights of an income bondholder, and the additional rights and security which the mortgage gives. And after net earnings have been ascertained and set apart by the corporation for the payment of money secured by income bonds or mortgages, or as a sinking fund for the final redemption of such bonds or mortgage debts they would not be liable to garnishment at the suit of other creditors of the corporation: see *Pullan v. Cincinnati & Chic. Rd.*, 4 Biss. (U. S. C. C.) 35; 5 Biss. 237; *Jessup v. Bridge*, 11 Ia. 572; *Dunham v. Isett*, 15 Id. 284; *Mississippi Valley Rd. v. United States Exp. Co.*, 81 Ill. 534; *Galena & Chic. Rd. v. Menzies*, 26 Id. 121; *Clay v. East Tenn. Rd.*, 6 Heisk. (Tenn.) 421; 1 Jones on Mort., sect. 772; 2 Rorer on Railr., sects. 1377, 1378. As to the rights of different classes of bondholders, see *Galveston Rd. v. Cowdrey*, 11 Wall. 459.

SECT. 7. *Remedy of the income bondholder in case of a diversion of earnings.*

The funds set apart or equitably assigned for the payment of income bonds, or income mortgages, cannot be diverted by the corporation to other purposes. There is in such a case an equitable lien upon them, and the holder of the bonds or mortgages may follow the funds into whosoever hands they may be traced. The

net earnings would constitute a trust fund, and his lien will cover any property into which they may have been converted, except where it is in the hands of a *bona fide* purchaser for value: Story's Eq. Jur. (12 ed.) 1252; *Union Trust Co. v. Souther*, 107 U. S. 591; *Fosdick v. Schall*, 99 Id. 235; *Calhoun v. St. Louis & S. E. Rd. Co.*, 9 Biss. (U. S. C. C.) 330; *Texas v. Hardenberg*, 10 Wall. 68; *Union Trust Co. v. Walker*, 107 U. S. 596. If the net earnings have been diverted for permanent improvements or otherwise, and the property has been sold under a mortgage made subsequently to the execution of a bond the court will restore the income out of the proceeds of the sale: Id.; and securities purchased with the trust funds will be substituted for them: *Harford v. Lloyd*, 20 Beav. (Eng.) 10; *Fosdick v. Schell*, 99 U. S. 235.

SECT. 8. *In case of consolidation of the debtor corporation with another.*

A consolidation of one railroad company with another will not extinguish the rights of the income bondholders of either; for, although the consolidated company takes the property and interests of the old companies, it takes them subject to all liens, and the consolidated company would hold the same as trustee for the benefit of the bondholders, and other creditors of the divisional roads: *Harison v. Union Pacific Rd.*, 13 Fed. Rep. 522; *Skiddy v. Atlantic, Miss. & O. Rd.*, 3 Hughes (U. S. C. C.) 320; *Shields v. Ohio*, 95 U. S. 319. A bondholder's lien is superior to that of a common creditor or stockholder, and adheres both to the property and its proceeds, and this cannot be taken away by consolidation without his consent; unless, perhaps, under some statute existing at the time of the issuing of the bonds: Id.; *Rutten v. Union Pac. Rd.*, 17 Fed. Rep. 480; 16 Reporter 199; *Ketcham v. St. Louis*, 101 U. S. 306; *Pullan v. Cincinnati & Chic. Rd.*, 4 Biss. (U. S. C. C.) 35; 5 Id. 237. If the earnings are diverted by the consolidation of the debtor corporation with another corporation, which receives the earnings, the income bondholder may recover them of the latter company: Id.; *Ritten v. Union Pac. Rd.*, *supra*; see, also, *Shields v. Ohio*, *supra*; *Curran v. State of Arkansas*, 15 How. (U. S.) 304; *Eaton & Hamilton Rd. v. Hunt*, 20 Ind. 463; *Selma, &c., Rd. v. Harbin*, 40 Ga. 706.

Equity will follow diverted earnings or other equitable funds into the hands of transferees with notice, or without value, and will

pursue the property through all its transmutations, substituting one security for another, wherever its ends will be best accomplished: *Union Trust Co. v. Souther*, 107 U. S. 591; *Fosdick v. Schall*, 99 Id. 235; *Shiddy v. Atlantic, Miss. & O. Rd.*, 3 Hughes (U. S. C. C.) 320; see, also, *Powell v. North Missouri Rd.*, 42 Mo. 63; *Prouty v. Lake Shore Rd.*, 52 N. Y. 363; *Boardman v. Lake Shore & Mich. S. Rd.*, 84 N. Y. 157; *Selma, &c., Rd. v. Harbin*, 40 Ga. 706.

A railroad corporation may mortgage its future earnings, although the road be not *in esse* at the time of the execution of the mortgage, and such earnings, when they have accrued, cannot be attached in the hands of an officer of the corporation, at the suit of a common creditor: *Jessup v. Bridge*, 11 Ia. 572; *Boardman v. Lake Shore & Mich. S. Rd.*, *supra*; see, also, *Buck v. Memphis & Little Rock Rd.*, 4 Cent. L. J. 430. And, perhaps, generally, earnings cannot be attached in that way: *Pettingill v. Androscoggin Rd.*, 51 Me. 370; *Fowler v. Pittsburgh, &c., Rd.*, 35 Penn. St. 22.

SECT. 9. *What operates as an assignment of a fund—illustration of the doctrine.*

It is not essential to constitute a fund, and a lien upon it in favor of a creditor of a corporation or individual, that the assignment be in express terms, but the intention to make it may be inferred from the words used, and the circumstances of the case; *Dillon v. Bernard*, 1 Holmes (U. S. C. C.) 386; *In re Strand Music Hall Co.*, 3 De G., J. & S. 147; *Williams v. Ingersoll*, 89 N. Y. 508. In the case last cited, EARLE, J., said: "The form of words used in making the agreement is not alone to receive attention, but all the circumstances are to be considered. It is a rule in equity that anything that shows an intention to assign on the one side, and from which an intent to receive may be inferred on the other, will operate as an assignment if sustained by a sufficient consideration." But where there was a mere promise to pay a debt out of a certain fund which was not in terms assigned for such payment, it was held that the circumstances were not sufficient to show an intention that the agreement should operate as an assignment of the fund: *Christmas v. Russell*, 14 Wall. 69; see also *Hosack v. Rogers*, 6 Paige (N. Y.) 415; 8 Id. 229; 25 Wend. (N. Y.) 313; *Risley v. Phoenix Bank*, 83 N. Y. 318; *Jones on Corp.*, sect. 75.

SECT. 10. *Net earnings or income—mode of ascertaining.*

In general it may be said that net earnings or income is the

excess of receipts of a business over expenditures, or the receipts of a business after deducting the current expenses. The mode of determining the net income of a corporation would usually be the same, whether it be for the purpose of declaring dividends upon the stock, common or preferred, or of applying the same to the payment of income bonds; and usually the controversy in such cases relates to the question as to what are current expenses or other proper items, to be deducted from the gross income, to determine the net earnings or income. It may be observed that controversy on the question may be, and in case of income bonds, now, perhaps, generally is avoided by the conditions or stipulations of the contract, providing what may be paid out of the gross earnings or what shall be regarded as current expenses and deducted from the gross earnings in order to ascertain the net earnings or income. Experience has shown the wisdom of such provisions in cases where doubt or uncertainty may arise on the subject.

In *St. John v. Erie, &c., Rd.*, 10 Blatchf. (U. S. C. C.) 271, Judge BLATCHFORD, said: "Net earnings are properly the gross receipts, less the expenses of operating the road, or other business of the corporation. Interest on debt is paid out of what thus remains, that is, out of the net earnings. When all liabilities are paid, either out of the gross receipts or the net earnings, the remainder is the profit of the stockholders, to go toward dividends, which in that way are paid out of the net earnings:" see also same case, 22 Wall. 136; *Thompson v. Erie, &c., Rd.*, 45 N. Y. 468.

The rule for determining the net profits of a railroad corporation, including proper matters of deduction from the gross earnings, was more fully stated and illustrated by the Master of the Rolls, ROMILLY, in a case before him, as follows: "I am of opinion that all the debts of the company are first payable, other than those which, for want of a better expression, may be called funded debts. For instance, if the defendants have received money by mortgage, under the powers contained in their act, for the purpose of completing their line, this does not constitute such a debt as can be paid off out of the profits before the profits are divided. But on the other hand any debts which have been incurred, and which are due from the directors of the company, either for steam-engines, for rails, for completing stations, or the like, which ought to have been paid off at the time, had the defendants possessed necessary funds for that purpose, those are so many deductions from the profits, which in

my opinion, are not ascertained till the whole of them are paid:" *Corry v. Londonderry, &c., Rd.*, 29 Beav. (Eng.) 263; 30 L. J. Ch. 290; see also *Union Trust Co. v. Walker*, 107 U. S. 596; *People v. Supervisors*, 4 Hill. (N. Y.) 20; 7 Id. 504; *Karnes v. Rochester, &c., Rd.*, 4 Abb. Pr., N. S. (N. Y.) 107; *Utica v. Churchill*, 33 N. Y. 238; *People v. Commissioners*, 35 Id. 423; 4 Wall. (U. S.) 244; *Cunningham v. Vermont, &c., Rd.*, 12 Gray (Mass.) 411; *McLaughlin v. Detroit, &c., Rd.*, 8 Mich. 100; *Ohio City v. Cleveland, &c., Rd.*, 6 Ohio St. 489; *Pullan v. Cincinnati & Chicago Rd.*, 4 Biss. 35; s. c. 5 Id. 237.

In the case last cited, the action was upon a mortgage made by the New Castle and Richmond Railroad Company. The decision involved a construction of the mortgage and rested upon the theory that, by the terms of it, the mortgagee should have a specific lien upon the net earnings of the road. The mortgage was made February 25th 1852, to secure bonds to the amount of \$300,000, payable in fifteen years. The mortgage, by its terms, covered and included "the present and future to be acquired property of the New Castle and Richmond Railroad Company, that is to say, the first section of their road from New Castle to Richmond, as aforesaid, with the superstructure, and all rails and other materials used therein, and all rights therein, tolls and income, and any rights thereto or interest therein, together with the tolls or income to be had or levied therefrom, and all franchises, rights and privileges of the said The New Castle and Richmond Railroad Company of, in, to or concerning the same." Subsequently, that company executed another mortgage on the same property; and on a sale thereof on foreclosure of the same, July 1st 1860, the defendant purchased the property, and at the time of filing the bill in this case, to wit, November 1864, was in possession of and operating said road as a part of its through line, but had not kept any separate account of the earnings of it. Judge DRUMMOND held, that the plaintiff had a lien upon the net earnings of the road, and that such lien fastened upon the net earnings of the defendant's road as fast as they accrued; that the defendant, as successor of the mortgagor, was liable therefor from the time it took possession, but not from the date of the mortgage; that as the defendant purchased the road subject to and with knowledge of this lien, it ought to have kept separate accounts of the net earnings of this section, and the receiver was directed to make an approximate account of these earn-

ings prior to the receivership, and a more accurate one subsequently; and the defendant company was directed to pay to the plaintiff the amount of the net earnings so estimated for a period of twelve years, or from the date of the defendant's first possession until the decree, amounting to several hundred thousand dollars. It was considered by the court that the defendant company could not equitably object to such an approximation, since it was its own fault that a more accurate estimate could not be made; and in estimating the net earnings, the court did not allow the amount invested in permanent improvements to be included in the amount to be deducted as expenses from the gross earnings. See, also, *Pennock v. Coe*, 23 How. (U. S.) 117; 2 Redf. Am. Railw. Cas. 667.

G. W. FIELD.

RECENT AMERICAN DECISIONS.

Supreme Court of Ohio.

ADAMS v. YOUNG.

Where fire is negligently thrown from a mill smoke-stack, and carried to a building outside the mill property, and thence to another building of a third party, and thence to other property that is damaged by the fire, whether such negligence is the proximate cause of such damage is a question of fact for the determination of the jury under the instructions of the court.

In an action against a mill-owner for damages to property caused by fire negligently or carelessly thrown by sparks from the smoke-stack of the mill, and carried to the property by a gale of wind blowing at the time in the direction of the property, by which fire the same was damaged, where the conditions continue the same as when the negligent and careless act was done, and no new cause intervenes, it is no defence that the fire first burned an intervening building, and was thence communicated by sparks and cinders, in the same manner to the building in which such fire consumed the property, though the buildings were separated by a space of two hundred feet.

ERROR to the District Court of Mercer county.

Isaac W. Young brought suit before a justice of the peace for \$299.97, for household and kitchen furniture, destroyed by the burning of his family residence, in the town of Macedon, in Mercer county. On appeal, Young averred in his petition that Adams owned and controlled a steam-engine, boiler and fixtures, and a machine for dressing staves, and propelled by steam; that the engine, boiler and fixtures were placed within one hundred feet of a frame stable in the town, and within three hundred feet of his

dwelling-house ; and that the smoke-stack attached to the boiler was defective and unsafe in this, that the screen upon the smoke-stack was coarse, and furnished no protection against sparks, and was in other respects defective, and the defendant well knew the same : and that on the 2d day of May 1878, the wind was blowing heavily from a south-westerly to a north-easterly direction, and in the direction of the stable and the dwelling ; and one George Watson, who was the employee and agent of defendant, and who was managing the machinery, did, on said 2d day of May 1878, fire up and start the machinery, and so negligently, carelessly, and improperly run and operate the same, by reason of the defective and insufficient screen aforesaid, and careless and negligent conduct and management of the machinery, *and under the gale of wind aforesaid*, and the proximity of the machinery to the stable and dwelling aforesaid, that the sparks from the smoke-stack set fire to the stable and dwelling-house so occupied by plaintiff. Plaintiff therefore avers that by carelessness, negligence and improper conduct and management of the machinery, boiler, smoke-stack, &c., *and under the gale of wind aforesaid*, by the agent and employee of defendant, the defendant did set fire to, and burn up and destroy the goods and chattels, &c., the property of plaintiff.

To the petition, Adams answered as follows : (1) That he admits that the plaintiff was, at the time the same was consumed by fire, the owner of the personal property, as averred in the amended petition, and that the defendant further admits that, at the time, he was the general owner of the engine, boiler, smoke-stack and machinery described in the amended petition ; but the defendant, in further answer to the amended petition, says that he denies each and every averment therein contained, not hereinbefore admitted. (2) And the defendant, for a second cause of defence, and for a further answer to the amended petition, says that the stable described in the amended petition was, at the time of the happening of the pretended grievances complained of, situated one hundred feet or more in a north-easterly direction from the engine, smoke-stack and machinery described in the amended petition, and that the dwelling-house of one James S. Crawford, was then situated two hundred feet or more in a north-easterly direction from the stable ; that the house of Crawford then contained large quantities of gunpowder, coal-oil and other explosive and highly combustible substances ; and that the property of plaintiff was situated in a frame building sixty feet

or more north of the house of Crawford. And the defendant avers that the fire which burnt and consumed the said property of plaintiff was communicated to said house of Crawford, by sparks and cinders from said stable, and from said house of Crawford to said house in which plaintiff's said property was situated, and from said last-named house to said property of plaintiff, and that in no other manner was said personal property set on fire and destroyed or injured. The said defendant, therefore, prays that he may go hence without delay, and with his costs.

To the second defence Young demurred, because the same did not state facts sufficient to constitute a defence. This demurrer was sustained, and the cause was tried upon the petition and first defence. The jury found that Young ought to recover of Adams. A motion for a new trial was overruled, and a judgment for Young was entered.

On proceedings in error, the District Court affirmed the judgment, and plaintiff in error now seeks to reverse these judgments.

The opinion of the court was delivered by FOLLETT, J.—Was the negligence of Adams the *proximate cause* of the loss sustained by Young? The law does not regard an injury from a *remote cause*. There is no dispute as to the legal proposition; the difficulty is as to its proper application to the particular case. The sustaining the demurrer to the second defence is the only complaint of the plaintiff in error. There is no complaint of the trial on the first defence, in which the jury found against the plaintiff in error, and in which the jury must have found that his negligence was the proximate cause of the loss of the goods.

Does the second defence show, as a matter of law, a bar to Young's recovery? This defence is that *the fire* which burnt and consumed the property, was communicated to the house of Crawford by sparks and cinders from the stable, and from the house of Crawford to the house where the property was situated, and then to the property. It is not claimed that this fire was not the *same fire* communicated to the stable, by sparks from the smoke-stack, when Adams's agent negligently and carelessly fired up and started the machinery. So, from the petition and answer, it is shown that the fire started by Adams, is *the fire* that consumed the goods. Adams does not aver or claim there was any new agency or cause at any point of the line of this fire, and does not aver or claim that the

"gale of wind" increased in force or changed in direction. The stable and the houses were not *causes* of communicating the fire, but they were only *conditions* of the communication, existing when the fire was started. Strictly, the law knows no cause but a responsible will; and, when such a will negligently sets in motion a natural force that acts upon and with surrounding conditions, the law regards such human actor as the cause of resulting injury. "As a legal proposition, we may consider it established that the fact that the plaintiff's injury is preceded by several independent conditions, each one of which is an essential antecedent of the injury, does not relieve the person by whose negligence one of these antecedents has been produced, from liability for such injury." Whart. Neg., sect. 85.

Adams does not aver his ignorance of the surrounding conditions, or that there was anything unusual about them, or any change as to them. The objection as to *distance* through the air is disposed of by the averments of the answer, that the fire was thus communicated; the surrounding conditions being as they were, and no other cause being shown. There is no averment that this loss is not a probable and ordinary result of the negligence of the plaintiff in error; and this principle is an important test, if it is not the only test. Whart. Neg., sect. 150.

Ryan v. N. Y. Cent. Rd. Co., 35 N. Y. 210, and *Pennsylvania Rd. Co. v. Kerr*, 62 Penn. St. 353, have been referred to as decisive here. The courts rendering those decisions have sufficiently "distinguished and explained" them.

In case of *Webb v. Rome, W. & O. Rd. Co.*, 49 N. Y. 420, FOLGER, J., on page 427, says: "I do not understand * * * that the decisions in 35 N. Y. and 62 Penn. St., *supra*, put forth any new rule of law, or one which has not been acted upon and recognised *pari passu*, with the recognition and growth of the principles upon which most of the cases above cited, are based. In *Ryan's Case*, the opinion of the court was, that the action could not be sustained, for the reason that the damage incurred by the plaintiff was not the immediate, but the remote result of the negligence of the defendant."

He then says: "*Kerr's Case* is the same in material facts, principle and reasoning." And he then says, (page 428): "I am of opinion that, in the disposition of the case before us, we are not to be controlled by the authority of the case in 35 N. Y., more than

we are by that of the long line of cases which precede it." And the court there held: "He who, by his negligence or misconduct, creates or suffers a fire upon his own premises, which, burning his own property, spreads thence to the immediately adjacent premises, and destroys the property of another, is liable to the latter for the damages sustained by him." And, on the facts there, also held: "In an action for the damages, the questions as to whether defendant was negligent in the use of its property, and as to whether the injury was the probable consequence of the negligent acts and omissions, were properly submitted to the jury."

In *Pennsylvania Rd. Co. v. Hope*, 80 Penn. St. 373, Chief Justice AGNEW says, on page 379: "But let us examine the case of *Rd. Co. v. Kerr*, and it will be found to be free from much of the criticism expended upon it." "It was not held in *Rd. v. Kerr* that when a second building is fired from the first, set on fire through negligence, it is a mere conclusion of law that the railroad company is not answerable to the owner of the second; or that if a fire is communicated from the locomotive to the field of A., and spreads through his field to the adjoining field of B., A. may be reimbursed by the company, while B. must set down his loss to a remote cause, and suffer in silence." Thus answering *Fent v. Toledo, P. & W. Ry. Co.*, 59 Ill. 362 and 358, *infra*. And in that case the court held: "Sparks from defendants' engine fired a railroad tie, from which rubbish, left by the defendants on their road, was fired, communicated with plaintiff's fence next to the road, and spread over two fields, burned another fence and standing timber six hundred feet distant from the road. Held, that the proximity of the cause was for the jury." "In such case the jury must determine whether the facts constitute a continuous succession of events so linked as to be a natural whole, or whether the chain is so broken as to become independent, and the final result cannot be said to be the natural and probable consequence of the negligence of defendants." In the opinion, the chief justice says (p. 378): "In determining this relation, it is obvious we are not to be governed by abstractions which in theory only cut off the succession. Abstractly each blade of grass or stock of grain is distinct from every other; so one field may be separated from another by an ideal boundary, or a different ownership, or it may be by a real but combustible division line." "It is at this point the province of the jury takes up the successive facts, and ascertains whether they are naturally and probably related

to each other by a continuous sequence, or are broken off or separated by a *new and independent cause*."

Some states, as Massachusetts and New Hampshire, have provided by statutes that railroad companies shall be liable for damage caused by fire communicated by its locomotive engines. And in *Perley v. Eastern Rd. Co.*, 98 Mass. 414, damage was recovered for injury to property situated half a mile distant from the railroad.

In the state of Kansas damage has been recovered for injury to property situated many miles distant from the origin of the fire: *Atchison, T. & S. F. Rd. Co. v. Stanford*, 12 Kan. 354.

In the case of *Atchison, T. & S. F. Rd. Co. v. Bales*, 16 Kan. 252, it was held: "Where fire, which is negligently permitted to escape from an engine of a railroad company, does not fall upon the plaintiff's property, but falls upon the property of another, setting it on fire, and then spreads by means of dry grass, stubble, and other combustible materials, and passes over the land of several different persons before it reaches the property of the plaintiff, and, finally reaching the property of the plaintiff at a great distance from where the fire was first kindled, sets it on fire and consumes it, held, that the negligence of the railroad company, in such a case, is not too remote from the injury to the plaintiff's property to constitute the basis of a cause of action against the company."

In case of *Poeppers v. Missouri, K. & T. Ry. Co.*, 67 Mo. 715, sparks from the locomotive set fire to the prairie where the grass was rank. The wind was high, and the fire extended three miles before night, then died down, and the next morning the wind rose, and carried the fire five miles further, where the fire destroyed plaintiff's property. The court held "that, as the rise of the wind was a thing which a prudent man might reasonably have anticipated, it could not be regarded as the intervention of a new agency, so as to relieve the company from the consequences of its negligence in permitting the fire to escape, and that the fire was in fact one conflagration, notwithstanding the lapse of time, and the great distance over which it travelled before reaching plaintiff's property." In Missouri this may be correct.

In *Delaware, L. & W. Rd. Co. v. Salmon*, 39 N. J. Law 300, the court held: "Where one, by negligence or misconduct, occasions a fire on his own premises, or the premises of a third person, which spreads from thence to the plaintiff's property, and causes an injury, the injury is not, as a legal proposition, too far removed

from his negligent act to involve him in legal liability." And 35 N. Y. and 62 Penn. St., *supra*, are disapproved.

The case of *Kellogg v. Chicago & N. W. Ry. Co.*, 26 Wis. 223, was fully considered, and the court held: "The maxim, *causa proxima non remota spectatur*, is not controlled by time or distance, nor by the succession of events. An efficient adequate cause being found, must be deemed the true cause, unless some other cause, not incidental to it, but independent of it, is shown to have intervened between it and the result. The maxim includes liability for all actual injuries which are the natural and probable result of the wrongful act or omission complained of, or were *likely* to ensue from it under ordinary circumstances." And 35 N. Y. and 62 Penn. St., *supra*, are disapproved.

In case of *Fent v. Toledo P. & W. Ry. Co.*, 59 Ill. 349, the opinion, delivered by Chief Justice LAWRENCE, disapproves of 35 N. Y., and 62 Penn. St., *supra*, and deals at length with remote and proximate causes. The court there hold: "If fire is communicated from a railway locomotive to the house of B., it is not a conclusion of law that the fire sent forth by the locomotive is to be regarded as the remote and not the proximate cause of the injury to B., but that is a question of fact, to be determined in each case by the jury, under the instructions of the court. If loss has been caused by the act, and it was, under the circumstances, a natural consequence which any reasonable person could have anticipated, then the act is a proximate cause, whether the house burned was the first or the tenth, the latter being so situated that its destruction is a consequence reasonably to be anticipated from setting the first on fire. If, on the other hand, the fire has spread, beyond its natural limits by means of a new agency—if, for example, after its ignition a high wind should arise, and carry burning brands to a great distance, by which a fire is caused in a place that would have been safe but for the wind—such a loss might fairly be set down as a remote consequence, for which the railway company should not be held responsible."

In *Milwaukee & St. P. Ry. Co. v. Kellogg*, 94 U. S. 469, the claim was that fire was negligently communicated from a steamboat of the company, by sparks from the chimney, to an elevator of the company, built of pine lumber, and 120 feet high, and standing on the bank of the river, and from the elevator to a saw-mill and lumber piles of Kellogg. The mill was 538 feet distant from the ele-

vator, and the nearest pile of lumber was 388 feet distant from it. When the steamboat went alongside the elevator, an unusually strong wind was blowing from the elevator towards the mill and lumber. The case was from Iowa. The court held: "The question as to what is the proximate cause of an injury is ordinarily not one of science or of legal knowledge, but of fact for the jury to determine, in view of the accompanying circumstances." "A finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, is not warranted unless it appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." "Where there is no immediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it."

In the case of *Hoyt v. Jeffers*, 30 Mich. 181, more than one building was burned by fire communicated by sparks from a mill chimney. As to the second building the court held: "even where such second building is at such a distance from the first, that its taking fire from the first might not, *a priori*, seem possible, yet if it be satisfactorily shown that it did, in fact, thus take fire without any negligence of the owner, or any fault on the part of any third party, which could be properly recognised as the proximate cause, and for which he could be held liable, the party through whose negligence the first building was burned, cannot, on principle, be held exempt from equal liability for the burning of the second."

These numerous citations show many phrases of this subject, and that each case must be determined by its peculiar facts, and so is largely within the province of the jury.

Here explosives are averred to have been in Crawford's house, but if they ever exploded it is not averred that any injury came from such explosion. There is shown no new cause operating after the fire was carried from the chimney of the mill on its destructive mission. The demurrer was rightly sustained, and the court did not err in affirming the judgment, and the judgment is affirmed.

The general rule of the common law respecting liability for injuries caused by fire is well stated in the case of *Hewey v. Nourse*, 54 Me. 258, by DICKERSON, J.: "Every person has a right to kindle fire on his own land for the purposes of husbandry, if he does it at a proper time,

and in a suitable manner, and uses reasonable care and diligence to prevent its spreading and doing injury to the property of others. The time may be suitable and the manner prudent, and yet, if he is guilty of negligence in taking care of it, and it spreads and injures the

property of another in consequence of such negligence, he is liable in damages for the injury done. The gist of the action is negligence, and if that exists in either of these particulars, and injury is done in consequence thereof, the liability attaches; and it is immaterial whether the proof establishes gross negligence or only a want of ordinary care on the part of the defendant." See, generally, Cooley on Torts 590, and cases cited.

Where the use of steam machinery is lawful, the same principles apply. If fires are kindled by sparks or otherwise in the use of it, no action lies unless negligence appears: Cooley on Torts 591, and cases cited.

Such being the general principles involved in the principal case, we come now to the main point of that case, the extent of the liability where a fire negligently caused has spread to a house adjoining the one first set on fire by the negligence of the defendant.

In the cases of *Ryan v. N. Y. Cent. Rd.*, 35 N. Y. 210, and *Penna. Rd. v. Kerr*, 62 Penn. St. 353, it was held that, while the party guilty of the negligence would be liable to the owner of the adjoining house to which the fire spread, his liability does not extend further, and that he was not liable to the owner of another house to which the fire had spread from the burning of the first.

These cases are sufficiently criticised by the court in the principal case, and require no further notice. They seem to be founded more upon the vicious principle of expediency than upon sound reason, and, so far as we can see, have no valid support in reason or authority. The clear weight of authority is opposed to them, and they do not seem to be entirely satisfactory, even in the states where they were respectively decided. See *Webb v. Rome, &c., Rd.*, 49 N. Y. 27; *Pollett v. Long*, 56 Id. 206; *Oil Creek, &c., Rd. v. Keighron*, 74 Penn. St. 316; *Penna. Rd. v. Hope*, 80 Id. 373. The contrary doctrine is so

well stated by Judge COOLEY, in his work on Torts (p. 77), that we cannot do better than use his language: "The negligent fire is regarded as a unity; it reaches the last building as a direct and proximate result of the original negligence, just as a rolling stone put in motion down a hill, injuring several persons in succession, inflicts the last injury as a proximate result of the original force as directly as it does the first; though, if it had been stopped on the way and started anew by another person, a new cause would thus have intervened, back of which any subsequent injury could not have been traced. Proximity of cause has no necessary connection with contiguity of space or nearness in time. The slow match, which causes an explosion after much time and at a considerable distance from the ignition, and the libellous letter which is carried from place to place by different hands before publication, produce an injurious result which is as proximate to the cause and as direct a sequence as if, in the one case, the explosion had been instantaneous, and in the other, the author had called his neighbors together and read to them the libel." Citing *Smith v. London, &c., Rd.*, L. R., 5 C. P. 98; *Perley v. Eastern Rd.*, 98 Mass. 414; *Clemens v. Hannibal, &c., Rd.*, 53 Mo. 366; *Hoyt v. Jeffers*, 30 Mich. 181; *Fent v. Toledo, &c., Rd.*, 59 Ill. 349; *Toledo, &c., Rd. v. Muthersbaugh*, 71 Id. 572; *Annapolis, &c., Rd. v. Gantt*, 39 Md. 115; *Baltimore, &c., Rd. v. Reaney*, 42 Id. 117; *Kellogg v. Chicago, &c., Rd.*, 26 Wis. 223; *Hooksett v. Concord, &c., Rd.*, 38 N. H. 242; *Atchison, &c., Rd. v. Stanford*, 12 Kan. 354; *Kellogg v. St. Paul, &c., Rd.*, 94 U. S. 469; *Delaware, &c., Rd. v. Salmon*, 39 N. J. 299. The same principle was also ruled, or assumed as settled, in the following cases: *Atchison, &c., Rd. v. Boles*, 16 Kan. 252; *Poeppins v. Missouri, &c., Ry.*, 67 Mo. 715; *Small v. Chicago, &c., Rd.*, 50 Ia. 338; *Toledo, &c., Ry. v.*

Pindar, 53 Ill. 447; *Ins. Co. v. Tweed*, 7 Wall. 44; *Ingersoll v. Stockbridge, &c., Rd.*, 8 Allen 438. See, also, *Lehigh Valley Rd. v. McKeen*, 90 Penn. St. 122. See, however, *The Pennsylvania Co. v. Whitlock*, 99 Ind. 16, 26; *Hoag v. Lake Shore, &c., Rd.*, 18 Am. L. Reg. (N. S.) 214, and note.

Upon the whole, the principal case seems to have been decided in accordance with both principle and the clear weight of authority.

M. D. EWELL.

Chicago.

Supreme Court of Indiana.

TYLER v. ANDERSON.

Where land is sold at a fixed price per acre, and the vendor fraudulently misrepresents the number of acres, the vendee is entitled to an abatement in the purchase price, although the deed contains, after specifying the number of acres, the phrase "more or less."

An answer of failure of consideration must set out the facts showing the failure; and error in sustaining a demurrer to such an answer is not rendered harmless merely because a general plea of want of consideration is left standing.

APPEAL from Warren Circuit Court.

C. V. McAdams and *Wm. P. Rhodes*, for appellant.

W. L. Rabourn, for appellee.

The opinion of the court was delivered by

ZOLLARS, J.—Suit upon a promissory note executed in 1882. The court below sustained a demurrer to the first paragraph of appellant's answer. That ruling is the only question presented for review here. The substantial averments of that answer may be epitomized as follows: In 1874, appellant purchased of Ruth V. Anderson two tracts of land, and received from her two warranty deeds therefor, copies of which are made a part of the answer. In one of them the consideration is stated as the sum of \$10,800, and the land is described as the N. E. $\frac{1}{4}$, and E. $\frac{1}{2}$ N. W. $\frac{1}{4}$, section 24, township 21 N., range 10 W., containing 240 acres more or less. In the other the consideration is stated as the sum of \$3200, and the land is described as the E. $\frac{1}{2}$ S. W. $\frac{1}{4}$, section 13, township 21 N., range 10 W., containing 80 acres, more or less. The contract of sale entered into by appellant and Ruth V. Anderson was that appellant should pay for the 240 acres at the sum of \$45 per acre, and for the other tract of 80 acres at the sum of \$40 per acre, the sale and purchase being by the acre, and not for a gross sum.

Ruth V. Anderson represented to appellant that one of the tracts contained 240 acres, and that the other contained 80 acres. In fact, and by actual measurement, the tract represented as containing 240 acres contains but 235.10 acres, and the other contains but 77.40 acres. Appellant, believing and relying upon the representations as to the number of acres, made no measurement or survey of the lands, and paid part cash, and gave his notes for the balance of the purchase-money, calculated at \$45 per acre for 240 acres, and at \$40 per acre for 80 acres. These notes were secured by a mortgage upon the lands. The deficiency in acreage was unknown to him for several years after the sale and execution of the deeds, and until after the execution of the note in suit. At the time Ruth V. Anderson made the representations, she knew they were not true, and that the tracts of land did not contain so many acres as she had represented. The words "more or less" were inserted in the deeds without appellant's knowledge, and without anything being said concerning their use. On the day the note in suit was executed appellee, as the agent of his mother, Ruth V. Anderson, settled with appellant. In that settlement it was found that appellant yet owed of the purchase-money \$6187. For the purpose of having the mortgage upon the lands released he paid to appellee, as the agent of his mother, the whole of said amount, except \$300, and for that amount agreed to give his note. In pursuance of this settlement and agreement the mortgage was released, and appellant executed the note in suit. The land so purchased was the only consideration for the note. Without the knowledge or consent of Ruth V. Anderson, the note was made payable to appellee, who was her son and agent, and appellant signed the same without examination, supposing it was made payable to Ruth V. Anderson, and had no knowledge to the contrary until this action was commenced.

This plea shows that Ruth V. Anderson is the owner of the note, in such a sense that whatever defence appellant might have made had the note been made payable to her he may now make: *Waddle v. Harbeck*, 33 Ind. 231; *Swindell v. Richey*, 41 Id. 281. The plea also shows that the only consideration for the note is the land; it being only a renewal, to the extent of it, of the other notes given for the purchase-money. Any defence, therefore, that appellant might have made against those notes he may make against this. *Daniel*, Neg. Instr. 177.

Appellee contends that, if it should be conceded that there was

error in sustaining the demurrer to this answer, it was and is a harmless error, because the facts therein set up might have been given in evidence under the third answer, in which a want of consideration is alleged in general terms. We think otherwise. There was a consideration. The note in suit, like those of which it is so far a renewal, was given for the land. The consideration has failed to the extent of the note by reason of there being a less number of acres of land than agreed upon. An answer of a total or partial failure of consideration must set out the facts showing the failure: *Billan v. Hercklebrath*, 23 Ind. 71.

The important question remains, does the answer properly state facts sufficient to show a failure of consideration? The words "more or less" in a deed, in connection with a description of land, are used to designate approximately the quantity of the land within the given boundary. In the absence of contracts, the quantity is always regarded as a part of the description. And where it appears by words of qualification, as "more or less," that the statement of the quantity of acres in the deed is mere matter of description and not of the essence of the contract, the buyer takes the risk of the quantity, if there be no intermixture of fraud: 4 Kent Com., vide page 467; Martind. Conv. 87; 1 Sugd. Vend. top page 490, bottom p. 324; *Williamson v. Hall*, 62 Mo. 405; 2 Hil. Real Prop. 535; *King v. Brown*, 54 Ind. 368; *Langsdale v. Girton*, 51 Id. 99. This is the general rule where the land is sold in lump, and for a gross sum, and there is no fraud or concealment or misrepresentation that amounts to fraud. An abatement of any portion of the purchase price on account of a deficit in the number of acres, in all cases where the quantity is merely a part of the description, rests upon the ground of fraud.

There may be cases where the deficit in the quantity is so great as to authorize an inference of bad faith and fraud on the part of the seller.

In the case of *Cravens v. Kiser*, 4 Ind. 512, it was said: "The general rule is that where land is sold by metes and bounds, and estimated to contain a specific quantity, or for 'more or less,' and a gross sum is paid for the entire tract, the vendee will not be entitled to an abatement in price should the number of acres fall short of the estimated quantity. But this rule is not applicable where there is any fraud or concealment on the part of the vendor. It is true, the deficit in the quantity might be so great as to authorize

the inference that the seller acted in bad faith ; still such abatement must proceed on the ground of his fraudulent conduct."

Mr. Sugden lays down these rules: "(1) If an estate be sold at so much per acre, and there is a deficiency in the number of acres conveyed, the purchaser will be entitled to compensation, although the estate was estimated at that number in an old survey. (2) The rule is the same, though the land is neither bought nor sold professedly by the acre. The general rule, therefore, is that, where a misrepresentation is made as to the quantity, though innocently, the right of the purchaser is to have what the vendor can give, with an abatement for so much as the quantity falls short:" Sugd. Vend. bottom p. 324, top p. 489.

These rules more properly apply where it appears from the deed that the land was purchased by the acre, and a certain number of acres are stated, and where the deed does not contain the words "more or less." But, although the deed contains these words, the vendee will be entitled to an abatement in the purchase price, as against the vendor, and others with notice, or where the notes are not commercial paper, to the amount of the deficiency where, by the fraudulent representations of the vendor as to the number of acres, he is induced to enter into a contract that he would not otherwise have entered into, and to pay, or agree to pay, more than he otherwise would have done. And especially is this so where the land is purchased at an agreed price by the acre.

While some of the cases seem to distinguish between sales in gross and by the acre, others hold that there is no difference where there is fraud. It was held in the case of *Thomas v. Beebe*, 25 N. Y. 244, that where fraudulent representations relate to the quantity of land sold, it is immaterial whether the sale is in gross or by the acre. It was said: "The liability of the defendant for a fraudulent representation is as clear if the sale of the farm was in gross as if it was by the acre. The representations of the defendant may have induced the plaintiff to enter into the contract for the purchase in gross, instead of by the acre, and there would be great injustice in depriving him, on that account, of his remedy for the fraud."

That there may be an abatement in the purchase price, where a fraud has been practiced upon the vendee, has been many times held by the court. In the case of *Hawk v. Pollard*, 6 Blackf. 108, it was said: "If the tracts do not contain the number of acres

which the vendor represented them to contain, the defendant is entitled to an abatement out of the purchase-money for so much as the quantity falls short of the representation." See, also, *Cravens v. Kiser*, *supra*; *Cox v. Reynolds*, 7 Ind. 257; *Langedale v. Girton*, *supra*; *Reynolds v. Cox*, 11 Ind. 262; *Kennedy v. Richardson*, 70 Id. 524. See, also, *McCoun v. Delany*, 3 Bibb 46; *Solinger v. Jewett*, 25 Ind. 479.

It is contended by appellee that the defence set up cannot be allowed without a reformation of the deed. It is a sufficient answer to this to say that the defence is not based upon the contract as evidenced by the deeds. As said by the New York court in the case of *Thomas v. Beebe*, *supra*, the defence is based upon the fraud of the vendor, and not upon any warranty or contract on her part in regard to the quantity of the land. The doctrine, therefore, of merger of all previous negotiations and representations, and of the contract, in the deeds, has no application to the case. Fraud cannot be so merged. See, also, *Johnson v. Miln*, 14 Wend. 195. See, also, *Hines v. Driver*, 72 Ind. 125. Although not plainly asserted or plainly shown, it was upon this theory that parol evidence of fraud was allowed in the several cases above cited.

In the case before us it is alleged in the answer, in substance, as we have seen, that the amount to be paid for the lands was arrived at by a calculation upon an agreed price per acre; that the vendor represented to appellant that one tract contained 240 acres, and the other 80 acres; that she knew her representations to be false; and that appellant, in ignorance of the truth, believed, relied upon, and acted upon the representations thus made to him. Under the foregoing authorities, and others that might be cited, the facts so set up in the answer, if true, are such as to entitle appellant to an abatement from the purchase-money in proportion to the deficiency in the number of acres of land. That the facts set up in the answer are true, is admitted by the demurrer. It results from the foregoing that the judgment must be reversed. It is therefore reversed, at appellee's costs, and the cause is remanded, with instructions to the court below to overrule the demurrer to the second paragraph of appellant's answer.

General rule.—The general rule is, that stating in the instrument of conveyance the quantity of land conveyed, does not amount to a covenant that the quan-

tity conveyed is the exact number of acres or feet designated; *Powell v. Clark*, 5 Mass. 355; s. c. 4 Am. Dec. 67; *Fuller v. Carr*, 33 N. J. L. 157;

Campbell v. Johnson, 44 Mo. 247; *Howe v. Bass*, 2 Mass. 380; *Williams v. Hathaway*, 19 Pick. 387; *Tarbell v. Bowman*, 103 Mass. 341; *Mann v. Pearson*, 2 Johns. 37; *Jackson v. Defendorf*, 1 Caines 493; *Jackson v. Barringer*, 15 Johns. 471; *Dozier v. Duffee*, 1 Ala. 320; *Eubank v. Hampton*, 1 Dana 343; *Ragan v. Gwinn*, 19 La. Ann. 133; *Barrow v. Miller*, 16 Id. 114; *Davis v. Millandon*, 17 Id. 97; *Commissioners v. Thompson*, 4 McCord (S. C.) 434. Thus where land was described in the deed as amounting to fifty acres, and the grantor covenanted that he was fully seised of "said land," had a good right to convey the same, that it was unincumbered, and that he would forever warrant and defend the title, it was held, in an action for a breach of the warranty, in that the land did not contain fifty acres, that the statement of the number of acres was no part of the warranty: *Austin v. Richards*, 7 Heisk. 663; see *Kincuid v. Brittain*, 5 Sneed 119; *Park v. Cheek*, 4 Cold. 20; *Etheridge v. Vernoy*, 70 N. C. 713. In the case last cited the rule of *caveat emptor* was applied, although the loss was 162 acres in 2000: see *Boar v. McCormick*, 1 S. & R. 166; *Vaughan v. Mitchell*, 2 Brev. (S. C.) 100; *Cox v. Couch*, 8 Penn. St. 147.

Strict measure.—In some instances the words "strict measure" is used immediately after the enumerated number of acres supposed to be conveyed. These words add nothing to the deed, nor in any way affect it. Thus the land was described as "containing 200 acres strict measure, and no more." The quantity conveyed exceeded 200 acres; and it was held that the grantees took the whole. "The words of exact restriction to 200 acres and no more in the deed to the defendant, could never be allowed to supersede or control a palpable description so easily traceable, as was the Lawrence survey through its monuments and courses:" *Jackson v. McConnell*, 19

Wend. 175. Another deed, after the description by metes and bounds, had the words "containing 195 acres of land," and after excepting two pieces, one of 50 acres, and the other of 16, it was added: "There being in the lot hereby conveyed 135 acres, strict measure, the surplus, if any, not being hereby conveyed." It turned out that there was less than 135 acres. In an action on the covenants of the deed because of the deficit in acres, it was held that the wording of the deed as given, did not amount to a warranty that there were 135 acres: *Roat v. Puff*, 3 Barb. 353; see *Andrews v. Rue*, 34 N. J. L. 402; *Surgi v. Shooter*, 17 La. Ann. 68. *Quare*, if there had been over 135 acres? See last case cited.

More or less.—As in the principal case it is the practice, often, to add the words "more or less" to the quantity stated. These words are usually considered as expressions that the grantor will not hold himself liable for his representations of quantity: *Andrews v. Rue*, 34 N. J. L. 402; *Weart v. Rose*, 16 N. J. Eq. 290; *Course v. Boyles*, 21 Id. 212; *Dale v. Smith*, 1 Del. Ch. 1; s. c. 12 Am. Dec. 64; *Williford v. Bentley*, 5 J. J. Marsh. 181.

The expression is also construed to mean that the parties to the deed are to run the risk of gain or loss in the estimated quantity: *McCoun v. Delany*, 3 Bibb. 46; s. c. 6 Am. Dec. 635; *Young v. Craig*, 2 Bibb. 272; *Cutts v. King*, 5 Me. 482; *Blaney v. Rice*, 20 Pick. 62; *Chandler v. McCord*, 38 Me. 564; *Marshall v. Bompart*, 18 Mo. 84; *Dalton v. Rust*, 22 Tex. 133; *Sanders v. Godding*, 45 Ia. 463; *Whiting v. Dewey*, 15 Pick. 428. The words "neither limit nor extend the grant:" *Pierce v. Faunce*, 37 Me. 67. In a case already cited it is said that they are "meaningless words:" *Campbell v. Clark*, 6 Mo. 219; *Ayres v. Hayes*, 13 Id. 252; *Butterfield v. Cooper*, 6 Cow. 481; *Marvin v. Bennett*, 26 Wend. 169; *Faure v. Martin*, 7 N. Y.

210; *Voorhees v. DeMeyer*, 2 Barb. 37; *Lawrence v. Simonton*, 13 Tex. 220.

Describing the tract conveyed as containing so many acres, has the same effect as if the words "more or less" were added: *Williams v. Lane*, 2 Car. L. Rep. (N. C.) 266; s. c. 6 Am. Dec. 561. See the English cases; *Day v. Fynn*, Owen 133, cited in 9 Vin. Abr. 343; *Anon.*, Freeman's Ch. 106; *Troyford v. Wareup*, Finch. 310; *Townshend v. Stangroom*, 6 Ves. 340.

If the land conveyed has well defined boundaries, fixed and visible monuments, the enumeration of the number of acres supposed to be within such boundaries and monuments, is no part of the general covenant of warranty. In all such cases the purchaser gets just exactly what he purchased; *Dale v. Smith*, 1 Del. (Ch.) 1, s. c. 12 Am. Dec. 64; *Peay v. Briggs*, 2 Mills (S. C.) 98; s. c. 12 Am. Dec. 656; *Johnston v. Quarles*, 3 La. 90; s. c. 22 Am. Dec. 163; *Andrews v. Rue*, 34 N. J. L. 402; *Williams v. Lane*, 2 Car. L. Rep. 266; s. c. 6 Am. Dec. 561; *Couse v. Boyles*, 4 N. J. Eq. 212; *Weart v. Rose*, 16 Id. 290; *Grand Trunk Ry. v. Dyer*, 49 Vt. 74; *Pernam v. Wead*, 6 Mass. 131; *Chipman v. Briggs*, 5 Cal. 76; *Allerton v. Johnson*, 3 Sandf. Ch. 72. But a representation that all the land within certain defined boundaries is intended to be conveyed, and that it contains so much in area, will amount to a fraud if all the land within such boundaries is not conveyed by the deed: *Brooks v. Riding*, 46 Ind. 15; *Rutherford v. Tracy*, 48 Mo. 325; *Hampton v. Eubank*, 4 J. J. Marsh. 634.

As has already been stated, a sale by the bulk cannot alone be construed a warranty of the quantity stated: *Hershey v. Keembortz*, 6 Barr 128; *Kreiter v. Bomberger*, 82 Penn. St. 59; s. c. 22 Am. Rep. 750; *Morris Canal Co. v. Emmett*, 9 Paig 168; *Innis v. McCrummin*, 12 Mart. (La.) 425; *Gormley v. Oakey*, 7 La. 452; *Triplett v. Allen*, 26

Gratt. 721; s. c. 21 Am. Rep. 320. If the land be sold as containing so many acres, "be the same more or less," or equivalent words are used, at a certain price per acre, and there is no stipulation of quantity, nor any *mala fides*, there is no redress after the contract is closed; and if there is no written contract, the execution of the deed is the closing of the bargain: *Sugden on Vendors* 369; *Lawrence v. Staigg*, 8 R. I. 256; *Barnes v. Gregory*, 1 Head. 230; *Weart v. Rose*, 16 N. J. Eq. 290; *Tarbell v. Bowman*, 103 Mass. 341.

Sale by the acre.—The instance last given is of a sale by the acre, but the statement of the number of acres was not of the essence of the contract. If the statement is of the essence of the contract and there is a deficiency in the quantity stated, the purchaser is entitled to a corresponding deduction from the price. See cases last cited. In such an instance, the quantity is relied upon to fix the price: *Pickman v. Trinity Church*, 123 Mass. 1; s. c. 25 Am. Rep. 1; *Triplett v. Allen*, 26 Gratt. 721; s. c. 21 Am. Rep. 320; *Campbell v. Wilmore*, 6 J. J. Marsh. 209; *Jones v. Plater*, 2 Gill (Md.) 125. If it was the intention to sell by the acre, and not by the bulk, as can be gathered from the contract, the insertion of the words "more or less" will not prevent a recovery for the deficiency: *Wilson v. Randall*, 67 N. Y. 338; *Fannin v. Bellomy*, 5 Bush 663. In a Virginia case it was said that, in the absence of evidence to show that a hazard was intended, it will be presumed that the parties contracted with reference to quantity. "It is an important element in every agreement, and *prima facie* must be intended to influence the price: *Triplett v. Allen*, 26 Gratt. 721; s. c. 21 Am. Rep. 320; *Whaley v. Eliot*, 1 A. K. Mar. 343; s. c. 10 Am. Dec. 737; *Failing v. Osborne*, 3 Ore. 498; *Hutchings v. Moore*, 4 Met. (Ky.) 110. If the sale is by

bulk, a much larger deficit must be shown to entitle the claimant to relief than is required in a sale by the acre: *Rich v. Ferguson*, 45 Tex. 396; *Terrell v. Kirksey*, 14 Ala. 209; *Weaver v. Carter*, 10 Leigh. 37.

Sale in bulk.—If the amount of the purchase-money is expressed in a gross sum, it is the general rule that it is not a sale by the acre, but in gross: *Cravens v. Kiser*, 4 Ind. 512. Thus, where the deed described the land as "containing 91½ acres, more or less, being the house and all the land whereon C. now resides," and the sale was for \$10,500, a part payable down, and the "remaining unpaid balance to be paid at the rate of \$114.40 per acre;" and the \$10,500 was about four dollars more than 91½ acres at \$114.40; and the land, by a subsequent survey, was found to contain 118 acres; it was held that the \$10,500 was the sum fixed to be paid as the purchase-money, and C. could not recover for the excess above 91½ acres, although the contract was an executory one: *Coughenour v. Stauff*, 77 Penn. St. 191. See *Gillilan v. Hinkle*, 8 W. Va. 262. In a recent English case the land was described as "containing, by estimation, three acres or thereabouts," and it appeared that the vendor himself purchased it by this description, and believed it to contain that quantity, but it, in fact, contained two acres, one rood and twelve perches. It was held that there was no breach of any warranty, and the purchaser was not entitled to any compensation. The purchase-price was a gross sum: *Jolliffe v. Baker*, 23 Am. L. Reg. 162.

Military warrants.—In the case of a military warrant (issued at an early day) quantity was its controlling feature, and without its being designated, the warrant was void. After issuance, the holder could locate it at any place upon the public domain. When these warrants were first issued the public

domain was unsurveyed, and each locator must run out his own lines and locate his own corners; and as his only object was to locate the quantity designated in the warrant, the courts adopted the rule that "the call and course must yield to the call for quantity, the latter being the most important call in the entry:" *Croghan v. Nelson*, 3 How. 187. The rule applicable to these warrants is not, therefore, the general rule followed with reference to the statement of quantity.

Conveyance by government surveys.—Conveying the land by the government surveys is no warranty that the parcel contains the quantity designated by the survey: *Doe, ex dem. Phillips, v. Porter*, 3 Ark. 18; s. c. 36 Am. Dec. 448; *Williamson v. Hall*, 62 Mo. 405; *Harrell v. Hill*, 19 Ark. 102.

Known by a particular name.—The instances just given is where land is known by a designated number. Land may also be known by a certain name. If conveyed by such name, the designating of the quantity supposed to be conveyed will not be a warranty of the amount intended to be conveyed. Thus a grant was of the surplus of the "Rancho of Old and New San Jacinto," out of which two grants had been previously made; and the surplus was described as "the extent of which is about five leagues, more or less." The surplus, in fact, embraced about eleven leagues. It was held that the entire eleven leagues passed by the grant: *United States v. Aguirre*, 1 Wall. 311. In the case given there was a mutual mistake. In such an instance, both parties are bound: *Moore v. Vick* 2 How. (Miss.) 746; s. c. 32 Am. Dec. 301; *Clark v. Scammon*, 62 Me. 47.

No boundaries.—Land may be conveyed without designating the boundaries, or any corners or monuments marking its extent, but by designating the number of acres intended to be con-

veyed. In all such instances, the number of acres designated is an essential part of the description. Thus, it was held that a tract of land containing 843 acres could not be conveyed by a description of "all that tract of land, containing 190 acres, more or less, situate in the district of Barnwell, bounded on the lands of William Nimmons and others:" *Kirkland v. Way*, 3 Rich. L. (S. C.) 4; s. c. 45 Am. Dec. 752. It was said that the number of acres was the only certain description in the deed; and to reject the number rendered the deed more uncertain and obscure. "Giving effect to the number of acres mentioned in the deed, as an essential part of the description, it does not appear that the tract found for the plaintiff in this suit was the same which was conveyed to him. A tract answering to the other imperfect terms of description, but containing 843 acres, is not the same which was described as containing 190 acres." In another case, in the same state, a tract was described as "containing 360 acres, bounded on lands belonging to A., B., C. and others." On resurvey, it was found to contain only 343 acres. A discount for the deficiency was allowed. It was said that "the land is not so described by metes and bounds as to furnish any data by which the number of acres might be known. It is described as joining the lands of other persons merely for the purpose of fixing the locality:" *Talbot v. Mason*, 2 McCord (S. C.) 440. See *Peay v. Briggs*, 2 Mill. 98; s. c. 12 Am. Dec. 656; *Barksdale v. Toomer*, Harp. (S. C.) 290; *Welch v. Phillips*, 1 McCord (S. C.) 215. In case the boundaries are doubtful, quantity often becomes a controlling feature of the deed: *Winans v. Cheney*, 55 Cal. 567; *Field v. Columbet*, 4 Sawy. 523.

Conveyance out of a larger tract.—If the conveyance is of a designated number of acres out of a larger tract named,

the boundaries to be ascertained by a subsequent survey, only the number of acres designated are conveyed, even though the words "more or less" follow the number given. Thus, where an application was made to the government to purchase two leagues of land, "more or less," according to certain designated boundaries; and the grant did not mention the quantity, but provided for the measurement of the tract and reservation of the surplus, the court construed the grant in connection with the petition, and held that the two leagues mentioned in the petition were to be surveyed within the larger tract, but observed that if the boundaries had been defined in the grant, no surplus could be thrown off by a survey. In this way only could the conditional clause as to the measurement and surplus be made consistent with the previous language of the grant: *Yontz v. United States*, 23 How. 498; see *United States v. Fossat*, 20 Id. 413.

A testator devised to his grandson 350 acres of land, "being the upper part of a tract of 700 acres;" and to his two granddaughters "the lower part of the same tract, to be equally divided between them." The tract was found to contain, in fact, 1100 acres. It was held that the grandson was entitled to only 350 acres, and the granddaughters to 375 acres each: *Williams v. Lane*, 2 Car. L. (N. C.) 266; s. c. 6 Am. Dec. 561. See *Bartlett v. Corliss*, 63 Me. 287; *Harper v. Lindsey*, Meigs (Tenn.) 310.

Covenant as to amount.—It is possible for the grantor to bind himself by a covenant that the amount stated in the deed is the true amount. And words used in a deed may amount to a covenant, although not in the express terms of a covenant. Thus, where land was described by the governmental surveys, and followed by the clause, "the whole of the within-described lands contain in all 1268.71-100 acres," it was held that these words constituted a covenant as to

the quantity of the land : *Minge v. Smith*, 1 Ala. 415.

Fraudulent representation.—If any fraud is attempted in giving the number of acres, the words "more or less" will not cure it: *Cravens v. Kiser*, 4 Ind. 512; *Langedale v. Girton*, 51 Id. 99; *Kreiter v. Bomberger*, 82 Penn. St. 59; s. c. 22 Am. Rep. 750; *Failing v. Osborn*, 3 Ore. 498; *Noble v. Googin*, 99 Mass. 231; *McCunn v. Delaney*, 3 Bibb. 46; s. c. 6 Am. Dec. 635; *Dale v. Smith*, 1 Del. Ch. 1; s. c. 12 Am. Dec. 64. If, as an inducement to the sale, the vendor states the amount to be of so many acres, and says he knows so, of his own knowledge, his statement amounts to a fraud on the vendee, if the amount is not so great, even though he believes the number is as he states it; and this too, even though the vendee would have made the purchase without such representation: *Cabot v. Christie*, 42 Vt. 121; see *Jolliffe v. Baker*, 23 Am. L. Reg. 162; but see *Winch v. Winchester*, 1 Ves. & B. 375.

Concealment.—Any concealment on the part of the vendor which prevents inquiry as to the amount of the land sold or conveyed, will avoid the sale if the quantity falls short: *Cravens v. Kiser*, 4 Ind. 512; *Dale v. Smith*, 1 Del. Ch. 1; s. c. 12 Am. Dec. 64; *Couse v. Boyles*, 4 N. J. Eq. 212; *Cabot v. Christie*, 42 Vt. 121. Such would be the case where the amount stated in the negotiations is known to be false, even though the words "more or less" are used in the deed: *Ketcham v. Stout*, 20 Ohio St. 453; *Cabot v. Christie*, 42 Vt. 121; *Hill v. Buckley*, 17 Ves. 394; *Baldwin v. Shannon*, 43 N. J. L. 596.

Equal knowledge.—If both vendor and vendee have the same means of ascertaining the exact quantity, and neither knows it, a deficiency will not avoid the deed, unless it is so great as to raise the presumption that a mutual mistake was made: *Allen v. Gibson*, 53 Ga. 600;

Jolliffe v. Baker, 23 Am. L. Reg. 162; *Kreiter v. Bomberger*, 82 Penn. St. 59; s. c. 22 Am. Rep. 750, 754; *Noble v. Googins*, 99 Mass. 231; *Weart v. Rose*, 16 N. J. Eq. 290; *Ketchum v. Stout*, 20 Ohio 453; *Jenkins v. Belgiano*, 53 Md. 407; *Peden v. Owens*, Rice Ch. (S. C.) 55. Usually if the purchaser gets exactly what he purchased, he is bound by the contract, although he may be mistaken as to the quantity: *Jacoby v. Beckett*, 19 Ind. 395; *Andrews v. Rue*, 34 N. J. L. 402; *Couse v. Boyles*, 4 N. J. Eq. 212; *Smith v. Negbauer*, 42 N. J. L. 305; *Clark v. Scammon*, 62 Me. 47.

Gross errors.—Where the deficiency is small, no relief is granted, unless there is a covenant as to the quantity; if it is great, then it is evidence of fraud; and when unexplained it will be sufficient to set aside the deed or contract: *Solinger v. Jewett*, 25 Ind. 479; *Quesnel v. Woodlief*, 2 Hen. & Mun. 173; *Campbell v. Wilmore*, 6 J. J. Marsh. 209; *Thomas v. Perry*, 1 Pet. C. C. 49; *Putnam v. Hill*, 38 Vt. 85; *Boar v. McCormick*, 1 S. & R. 166; *Glen v. Glen*, 4 Id. 488; *Bailey v. Snyder*, 13 Id. 160; *Ashcom v. Smith*, 2 Penn. St. 219; *Fredrick v. Campbell*, 13 S. & R. 136; *Haggerty v. Fagan*, 2 Penn. St. 533; *Coughenour v. Stauff*, 77 Id. 191; *Darling v. Osborne*, 51 Vt. 148; see *Heath v. Pratt*, 5 Id. 238. In such a case the complaining party must not have been guilty of any fraud or culpable negligence, nor otherwise have impaired the equity resulting from a mistake: *Harrison v. Buckley*, 17 Ves. 355; *Belknap v. Sealey*, 4 Kern. 143; *Jolliffe v. Baker*, 23 Am. L. Reg. 162.

Purchase for a particular purpose.—A purchase may be made for a particular purpose. If the vendor is aware of the design of the vendee in making the purchase, at the time it is made, and there is a deficiency, and the purchase thus fails to meet the object of the purchaser, the vendee may be relieved of his obliga-

tion; for the object of the purchase has failed, and he has been indirectly imposed upon: *Bond v. Quattlebaum*, 1 McCord (S. C.) 548; s. c. 10 Am. Dec. 702; *King v. Brown*, 54 Ind. 368, 375. But the insufficiency in quantity must be so great as to defeat the object of the purchase: *Pringle v. Witten*, 1 Bay (S. C.) 256; s. c. 1 Am. Dec. 612.

Executory and executed contracts.—In granting relief because of a deficiency or excess, the courts are inclined to draw no distinction between executed and executory contracts. "The principle is the same whether the contract only be executed or has been consummated by giving the deed; the injury is the same which the party sustains in the one case as the other, the mode of redress, and indeed the power of the court over the case may be very different:" *Couse v. Boyles*, 4 N. J. Eq. 212, 216; *Ketchum v. Stout*, 20 Ohio 453, 461; *Noble v. Googins*, 99 Mass. 231; *Hoback v. Kilgore*, 26 Gratt. 442; s. c. 21 Am. Rep. 317; *Blessing v. Beatty*, 1 Rob. 267; *Triplett v. Allen*, 26 Gratt. 721; s. c. 21 Am. Rep. 320; *Mendenhall v. Steckel*, 47 Md. 453; s. c. 28 Am. Rep. 481; *Marbury v. Stonestreet*, 1

Md. 152; *Kreiter v. Bomberger*, 89 Penn. St. 59; s. c. 22 Am. Rep. 750; *Smith v. Evans*, 6 Binn. 102. Laches may be a ground for refusing relief: *Delaney v. McDonald*, 47 Wis. 108; see *Wilson v. Randall*, 67 N. Y. 338; *Fauve v. Martin*, 7 Id. 210; *Martin v. Chambers*, 84 Ill. 579. This defence may be urged in a suit for the purchase-money as in the principal case: *Mendenhall v. Steckel*, 47 Md. 453; s. c. 28 Am. Rep. 481; *Darling v. Osborne*, 51 Vt. 148; *Noble v. Googins*, 99 Mass. 231; *Hill v. Buckley*, 17 Ves. 394; *Townshend v. Stangroom*, 6 Id. 341; *Davis v. Sabia*, 63 Penn. St. 90.

Specific performance.—If the purchaser discovers there is a deficiency before he gets his deed, he may still insist on a specific performance of the contract, or he may rescind it at his pleasure; and insisting upon performance does not deprive him of his right to a deduction for the deficiency: *Ketchum v. Stout*, 20 Ohio St. 452, 459; *Malins v. Freeman*, 3 Keen 25; *Manser v. Back*, 6 Hare 443; *Leslie v. Thompson*, 9 Hale 268; see *Pomeroy on Specific Performance*, sec. 245.

W. W. THORNTON.

Crawfordsville, Ind.

Supreme Court of Wisconsin.

JONES v. FLORENCE MINING COMPANY.

Where a master employs, to work in a dangerous place, a servant who from youth, inexperience or ignorance, is unable to appreciate the danger, it is the duty of the master to explain the nature of such danger, and if without such explanation the servant is set to work, either by the master or his agent, and is injured, the master is liable, even though the danger would have been apparent to a person of capacity and knowledge, and the immediate cause of the injury is the negligence of co-employees.

A boy, under fifteen years of age, who was employed by a mining company to carry drills above ground, went into the mine, and while carrying drills there was injured by the fall of ore from the roof. There was some evidence that he had been sent into the mine by either the captain or the pit boss, and that no explanation had been given him as to the dangerous character of the place. The weight of the evidence tended to show that the fall of the ore was the result of the negli-

gence of the miners themselves and not of the company or its subordinate officers. *Held*, that it was error for the court below to direct a verdict for defendant.

Semle. The duty of guarding against the danger resulting from leaving loose stones or ore in the roof or sides of a mine is one which the employer may reasonably impose on the miners themselves, but if a neglect of this duty is brought to the knowledge of the master and he takes no steps to remove the danger, he is liable to an employee who without contributory negligence is injured thereby.

Puterson v. Wallace, 1 Macq. 748, and *Hall v. Johnson*, 3 H. & C. 589, compared.

APPEAL from Circuit Court, Milwaukee county.

Adolph Herdigen and *J. G. Flanders*, for appellant.

Van Dyke & Van Dyke and *J. G. Jenkins*, for respondent.

The opinion of the court was delivered by

TAYLOR, J.—The appellant, a minor, brought this action to recover damages for an injury which he sustained while in the employ of the respondent company. The uncontroverted facts in the case are as follows: The appellant was at the time of the accident, according to his testimony, less than fifteen years old. He had been employed three weeks before by the company to work above ground, carrying drills and other tools from the mouth of the mine then being worked by the company, to the blacksmith-shop for repairs, and bringing them back to the mouth of the mine; that he had been so employed for about three weeks before he was injured; that on the day the injury was received the appellant had gone down into the mine, and was at work there carrying the drills from the place where they were used by the miners to the bottom of the shaft and putting them into the bucket, going up with them, and carrying them to the blacksmith-shop for repairs, and then returning them to the miners in mine No. 1; and that while he was in the mine, sitting down and waiting to take some drills which the miners were still using, a large piece of ore fell from the roof of the mine and struck him upon the leg, and so injured it that it became necessary to amputate it. To recover damages for this injury this action was brought.

Whether the appellant was sent into the mine by either the superintendent or captain of the mine, or by the mine boss, is a controverted question. The appellant, and at least one of the witnesses, testified on the trial that he was, on the morning of the day on which the accident happened, sent down into the mine to work in carrying and returning drills as above stated; and that previous to this time he had not worked in the mine at all, although he

admits he had been down in the mine a few times before, but had not been sent there to do any work until the morning of the accident. The captain of the mine and pit boss both testified that the appellant was not sent into the mine by either of them to do any work, but, on the contrary, that he had been forbidden by them to go down into the mine for any purpose. It is shown by the evidence that the appellant was placed under the pit boss, with instructions to do what the boss required him to do. There was testimony given on the trial, on the part of the appellant, showing that the pit boss was notified several times before the accident happened that the roof of the mine was in a dangerous condition, at the place where the accident happened, and that it ought to be attended to at once; and that the captain of the mine was informed the day before the accident happened that the roof of the mine was in a dangerous condition. The same witnesses also testified, that it was the duty of the pit boss to see that the mine is made all safe. This fact was also controverted, and on the part of the defendant, the evidence was that it was the duty of the miners themselves to see to the safety of the roof and walls of the mine, especially to see that all loose or dangerous rocks or ore was removed from the roof of the mine. But as the circuit judge directed a verdict for the defendant, we must, for the purposes of this appeal, consider the testimony given on the part of the appellant, as though it were uncontradicted by the evidence given on the part of the respondent; and the question is, whether, upon the evidence given by the appellant, the jury would have been justified in finding a verdict for the appellant.

On the part of the appellant it is claimed that, upon the evidence produced, the jury would have been justified in finding a verdict for the plaintiff upon two grounds: *First*. That it was the duty of the company to see that the roof of the mine where the plaintiff was at work was kept in a reasonably safe condition, and that if the injury occurred from a want of reasonable care on the part of the company in keeping the roof of the mine in such safe condition, then the company is liable to the plaintiff for the damages sustained. *Second*. That the company owed a duty to the plaintiff, who was a minor not over the age of fifteen years, if it sent him to work in a dangerous place, to fully instruct him as to the danger of the employment; and if it neglected so to instruct him, and he was injured by reason of a danger of which

he was not informed, and of which he had no adequate knowledge, then the defendant is liable, even though the accident was caused by the neglect of those employed in the mine, and not of the company.

On the part of the respondent it is claimed that the plaintiff was properly nonsuited. First, for the reason that the evidence conclusively shows that the accident happened solely through the fault of the miners working in the mine with the plaintiff, and so occurred through the fault and negligence of the co-employees of the plaintiff, and not through the fault of the company; second, if it should be admitted that it was the duty of the pit boss to see that the roof of the mine was kept in a safe condition, and the accident happened through the negligence of such pit boss, such negligence on his part would be the negligence of a co-employee, and not the negligence of the company, and the company would not be liable; third, that the injury occurred by reason of an accident which is incident to the business of working in mines, the risk of which the employee assumes when he enters the service, and there is no express or implied contract on the part of the mining company to protect him against such accidents.

As to the first point made by the appellant we are not prepared to say that it is well taken. There is the statement of one witness on the part of the plaintiff, made in a general way, "that the pit boss is supposed to get ore out of the mine, and see that the back is all right, and make the mine all safe." This is the only evidence given on that subject on the part of the appellant upon that point, and there is no explanation by the witness showing from what source he obtained his information as to the duty of the pit boss in this respect. On the part of the respondent the evidence is very strong that it was and is the duty of the miners themselves to see that the roof and sides of the mine are made safe against all danger from loose ore or stones, in the roof or sides of the mine in which they are working at the time, and as to that matter the pit boss has no particular charge or duty. We have grave doubts whether it would be our duty to set aside the nonsuit upon this point alone, where the evidence is so overwhelmingly against the plaintiff. There may be other dangers in the working and management of a mine which the court would, even in the absence of evidence, charge the employers with the duty of guarding against for the protection of those in their employ; but the danger resulting from

leaving loose stones or ore in the roof or sides of the mine is a danger which the employer may well impose the duty of guarding against upon those working in the mine. Such danger is the direct result of their operations, and they are always on the ground, and have better facilities for knowledge when a danger of that kind exists, and for removing the same, than the pit boss or captain of the mine, and there would seem to be no ground for holding that the owner of the mine may not impose such duty upon the miners themselves.

A different question might have arisen had the proofs shown that notwithstanding the general duty of the miners to provide against this danger, they had neglected to perform their duty, and the knowledge of this neglect had been brought home to the captain of the mine, or even the pit boss, and no steps had been taken, within a reasonable time, to remove such danger, or cause it to be removed, and an accident had happened, after such neglect, to an employee whose duty did not require him to protect himself against such danger. See *Gilman v. Rd. Co.*, 13 Allen 433, 441, 442, and cases there cited.

A case of that kind was decided by the House of Lords on an appeal from a Scotch court, and adversely to the mining company: *Paterson v. Wallace*, 1 Macq. 748. That was a mining case. The action was brought by the widow and children of the husband and father, who had been killed, while in the employment of the defendants, in their mine, by the falling of a stone from the roof of the main road of the mine, while the deceased was at work in the mine at the spot where the stone fell. The evidence showed that the underground manager of the mine had notice of the dangerous condition of the stone before the accident happened, in time to have removed it before it fell; that he advised the workmen that there was no immediate danger, and afterwards promised to remove it, and sent some persons to remove it, but before they reached the place the stone fell and killed the deceased. Upon that proof, the Scotch court directed a verdict for the defendant; and upon appeal to the House of Lords the judgment was reversed; that court holding that, upon the evidence, the case should have been submitted to the jury, because the evidence of the plaintiffs showed that the underground manager of the mine knew of the dangerous condition of the stone, and having such knowledge, it became his duty to cause it to be removed within a reasonable time, and if he

neglected so to remove it, and an injury happened to a person working in the mine by reason of such neglect, the company was liable in damages to the person so injured. In the opinion in that case it is said the court ought to have stated the law to the jury as follows: "That if Snedden, the defendant's manager, had failed in his duty in timeously directing the stone in question to be removed, it would afford no defence that Paterson continued to work after the orders for the removal of the stone had been actually given." There was nothing in the case tending to show that it was a part of Paterson's duty to protect himself against the defect in the roof of the mine.

This case seems to be in conflict with the case of *Hall v. Johnson*, 3 Hurl. & C. 589, cited by the learned counsel for the respondent, and much relied on in their brief in this case. In *Hall v. Johnson*, in the Exchequer Chamber, the court decided, in a case almost identical in its facts with the case of *Paterson v. Wallace*, that the defendant was not liable, and sustained a nonsuit ordered by the trial court on the ground that the underground manager, or, as he was designated in the last case, "under-looker," whose duty it was to see that the roofs of the mine were propped and made secure, was a co-employee with the person injured. Whether, upon all the facts in the two cases, they can stand together, or whether the cases are to be reconciled, upon the ground that the law in Scotland upon the subject of the liability of the master to the servant is different from the law in England, we need not consider in this case, as we have concluded that the judgment in this case must be reversed upon the sound proposition made by the learned counsel for the appellant.

We think it is now clearly settled that if a master employs a servant to do work in a dangerous place, or where the mode of doing the work is dangerous and apparent to a person of capacity and knowledge of the subject, yet if the servant employed to do work of such a dangerous character or in a dangerous place, from youth, inexperience, ignorance or want of general capacity, may fail to appreciate the dangers, it is a breach of duty on the part of the master to expose a servant of such character, even with his own consent, to such dangers, unless he first gives him such instructions or cautions as will enable him to comprehend them, and do his work safely, with proper care on his part. This rule does not in any manner conflict with the other well-established rule, that the employee in any particular business assumes all the risks and hazards

which are incident to such business, when the employee is of sufficient intelligence and knowledge to comprehend the dangers incident to his employment; and in the case of an adult person, in the absence of evidence showing the contrary, the presumption is that the employee has sufficient intelligence to comprehend the dangers incident to his employment: *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *Sullivan v. India Mfg. Co.*, 113 Id. 396; *Grizzle v. Frost*, 3 Fost. & F. 622; *Gilman v. Rd. Co.*, 13 Allen (Mass.) 433, 441, 442; *Coal Co. v. Reid*, 3 Macq. 266-295; *Hill v. Gust*, 55 Ind. 45; *Rd. Co. v. Valerins*, 56 Id. 511; *Rd. Co. v. Fort*, 17 Wall. 553; *Thompson v. Rd. Co.*, 14 Fed. Rep. 564; *Cook v. Rd. Co.*, 24 N. W. Rep. 311; *Anderson v. Morrison*, 22 Minn. 274; *Strahlendorf v. Rosenthal*, 30 Wis. 674. These cases, and many others which might be cited, fully establish the rule as above stated in regard to the employment of servants who, by reason of youth, inexperience, or want of capacity, are unable to comprehend the dangers incident to a hazardous employment.

There are many reasons given by the courts for holding to the rule above stated, the most satisfactory of which are, 1st, that the master owes a duty towards an employee who is directed to perform a hazardous and dangerous work, or to perform his work in a dangerous place, where the employee, from want of age, inexperience, or general capacity, does not comprehend the dangers, to point out to him the dangers incident to the employment, and thus enable him to comprehend, and so avoid them. and that neglect to discharge such duty is gross negligence on the part of the employer; 2d, that such an employee does not assume the risk of the dangers incident to such hazardous employment, because he does not comprehend them, and the law will not therefore presume that he contracted to assume them.

In the case of *Coombs v. New Bedford Cordage Co.*, *supra*, a boy of the age of fourteen years was employed to work in a dangerous place, on account of the machinery which was in operation in his immediate vicinity, and the court say: "The notice which the defendants were obliged to give the plaintiff of the nature of the risk incident to the service which he undertook, must be such as to enable a person of his youth and inexperience in the business intelligently to appreciate the nature of the danger attending its performance. The question, indeed, on this branch of the case, is not of due care on the part of the plaintiff, but whether the cause

of the injury was one of which he knowingly assumed the risk, or one which, by reason of his incapacity to understand and appreciate its dangerous character, or neglect of the defendant to take due precautions to effectually inform him thereof, the defendants were bound to indemnify him against the consequences. But in determining this question, it is proper and necessary to take into consideration, not only the plaintiff's youth and inexperience, but also the nature of the service which he was to perform, and the degree to which his attention, while at work, would need to be devoted to its performance. The obligation of the defendant would not necessarily be discharged by merely informing the boy that the employment itself, or a particular place or machine in the building or room in which he was to work was dangerous. Mere information in advance that the service was dangerous, or a particular thing connected with it was dangerous, might give him no adequate notice or understanding of the kind and degree of danger which would necessarily attend the actual performance of his work."

In the case of *Grizzle v. Trout*, *supra*, a girl sixteen years old was employed in a rope factory about a dangerous machine. The court say: "There is evidence both of negative and positive negligence on his part [meaning on the part of the foreman of the defendant]; negative, in not giving the girl proper instructions as to the use of the machine; positive, in expressly directing her to do the very thing she had done, and which was admitted was dangerous, so dangerous, indeed, that the case for the defence was that she had been told not to do it." In regard to the negligence of the foreman being the negligence of the defendants, in a case of this kind, the court say; "The foreman was put by them [defendants] in their place to employ this young person in and about dangerous machinery of which she was quite ignorant, and any negligence of his in the matter would be negligence for which they would be responsible."

In the case of *Rd. Co. v. Fort*, *supra*, a boy sixteen years old was injured while in the employ of the railroad company in a machine shop, and while performing a hazardous act in connection with the machinery, and not within the scope of his general employment. He undertook to do the dangerous act by order of one Collett, under whose control and superintendence he was at the time. The court, in the opinion, say: "But this boy occupied a very different position. How would he be expected to know the peril of the under-

taking. Hewas a mere youth, without experience, and not familiar with machinery. Not being able to judge for himself, he had the right to rely on the judgment of Collett, and doubtless entered upon the execution of the order without apprehension of danger. Be that as it may, it was a wrongful act on the part of Collett to order a boy, of his age and inexperience, to do a thing which, in its very nature, was perilous, and which any ordinary man would know to be so. * * * For the consequence of this hasty action the company are liable, either upon the maxim of *respondeat superior*, or upon the obligation arising out of the contract of service. The order of Collet was their order. They cannot escape responsibility on the plea that he should not have given it."

In *Coal Co. v. Reid*, 3 Macq. 266-295, the Scotch case of *O'Byrne v. Burn* is referred to by Lord CRANWORTH in his opinion. He states the facts of that case as follows: "The plaintiff was a girl, employed by the defendant in his clay mill. She was altogether inexperienced, having been only nine days in the defendant's service, and she was therefore unaware of the risks from the machinery. Anderson, acting under Burn as the manager of the works, put her to remove some waste clay while the rollers were in motion. This was a duty which Anderson ought to have performed himself, and it ought not to have been done at all until he had caused the movement of the rollers to be suspended. The pursuer, in attempting to remove the waste in obedience to Anderson's order, sustained a severe injury from the rollers in making the attempt; and she raised an action against Burn for damages. The lord ordinary held the allegation relevant, so as to entitle her to issues for the trial of the case." After stating the facts of the case as above quoted, Lord CRANWORTH says: "This might have been quite right. It may be that if a master employs inexperienced workmen, and directs them to act under the superintendent, and to obey the orders of a deputy, whom he puts in his place, they are not, within the meaning of the rule in question, employed in a common work with the superintendent. They are acting in obedience to the express commands of their employer, and if he, by the carelessness of his deputy, exposes them to improper risks, it may be he is liable for the consequences."

In the case of the same *Coal Co. v. McGuire*, 3 Macq. 311, the Lord Chancellor, referring to the case of *O'Byrne v. Burn*, says: "It was hardly possible to apply the principle of the servant hav-

ing undertaken the service with a knowledge of the risks incident to it. She was an inexperienced girl, employed in a hazardous manufactory, placed under the control, and it might be added the protection, of an overseer, who was appointed by the defendant, and intrusted with this duty; and it might well be considered that, by employing such a helpless and ignorant child, the master contracted to keep her out of harm's way in assigning to her any work to be performed."

In the case of *Stahlendorf v. Rosenthal*, *supra*, this court held that "one who agrees to work for another in any employment takes upon himself the usual risks of such employment; but if there exist facts known to the employer, and unknown to the employee, increasing the risk of such employment, the employer is bound to disclose such facts to his employee; otherwise, he will be liable for such negligence, in case of injury to the latter resulting from such unusual risks." In this case the court was speaking of an adult employee, who is presumed to understand and comprehend the ordinary risks of his employment. The rule stated in this last case, when applied to the employment of a person who from youth, inexperience, or want of intelligence, is incapable of comprehending the risk connected with a hazardous employment, would require the master to inform the employee of such dangers before putting him at his work, and if he failed to do so, would render him liable for an injury resulting from the danger which was known to the employer and unknown to the employee. The other cases cited place the liability of the master, in case of the employment of children, or other persons who are not competent to appreciate the risks of a hazardous employment, upon like ground.

The case of *Sullivan v. India Mfg. Co.*, 113 Mass. 396, is not in conflict with the cases in 102 Mass. and 13 Allen. The case in 113 Mass. simply holds that if a child be employed to operate a machine, and the employer fails to give proper instructions as to the manner of using it, the master will not be held liable, if it appears that the child had obtained the proper knowledge for using the machine from other sources before the accident happened.

It is said by the learned counsel for the respondent, that infancy and inexperience do not modify the rule of fellow-servants. But that statement only holds good, where it appears that such employee has been properly instructed by his employer, as to the dangers of his employment, or has acquired knowledge of such danger from

other sources. When he has been properly instructed, and knows the dangers of his employment, then he stands on the same footing as any other employee, and cannot recover for any injury caused by the negligence of his fellow-servant: see *Curran v. Merchants' Manufacturing Co.*, 130 Mass. 374; *Sullivan v. India Manufacturing Co.*, 118 Id. 396-399; *Anderson v. Morrison*, 22 Minn. 274.

In the case at bar, the evidence on the part of the plaintiff shows, that the plaintiff was less than fifteen years old when he entered into the employment of the defendant. The evidence on both sides shows, that when he was first employed, and up to the day he was injured, he was employed to work above ground, a work which was not apparently hazardous work. There is no evidence that he had ever before worked underground in a mine, or that he was at all familiar with the dangers of such employment. That the work under ground was not considered proper work for a boy of his age to perform, may be presumed from the fact that the defendant's captain and his boss both testified that they had forbidden him to go down into the mine for any purpose. The other evidence shows that the mine was a dangerous place to work in, from the fact that blasting was constantly going on in the mine, and that the consequence of such blasting was to loosen the ore and rock in the roof and sides of the mine, so that there was danger from the falling of such ore and rock; and the evidence establishes conclusively the fact that the plaintiff was injured by ore falling from the roof of the mine.

We are very clear that upon the evidence in the case, the question should have been submitted to the jury, whether the plaintiff was at work in the mine at the time of the injury, by direction of the pit boss or of the captain of the mine; and, if so at work by such direction, then whether he was of sufficient age and experience, or had sufficient information from the captain or pit boss, or from any other source, to comprehend the dangers incident to such employment. Had the jury found that the plaintiff was sent to work in the mine by the pit boss or captain of the mine, on the day the accident happened, and that, from his age, inexperience, and want of information, he did not comprehend the dangers attendant upon such employment, then the plaintiff would have been entitled to recover, although the injury was the result of the negligence of the miners, who were his fellow-servants.

The fact that the plaintiff was employed up to the day of the accident, to work above ground, at an employment not of a hazardous character, can have but little bearing on the question of the defendant's liability, except so far as it might, in connection with the other evidence in the case, tend to show that the persons representing the defendant did not consider it proper to employ a boy of his age to work under ground in the mine. The evidence on the part of the plaintiff shows that there was no agreement to work, only at one kind of work, but that he was to be at the direction of the pit boss, and do such work as he was ordered by him to do. If he directed him to go into the mine to work, the plaintiff had the right, and perhaps it was his duty to go to work there. The real question to be determined, so far as the plaintiff's rights are concerned, is this: Did the defendant, through its agents, do its duty towards the plaintiff, when they sent him to work in the mine, (if he was sent to work there), by informing him of the dangers incident to that kind of work? or was the plaintiff of sufficient age and experience, or had he sufficient knowledge on the subject, to comprehend the dangers incident to such employment? These questions should have been submitted to the jury. It was error, therefore, to nonsuit the plaintiff.

The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

I. Master's Liability for Injury to Infant Employee.—The infancy of the employee does not enable him to repudiate his agreement, implied in the contract of service, to assume all the risks of his employment which are patent or are explained to him and brought home to his understanding. This point is clearly stated by the court in the case of *De Graff v. New York Central, &c., Rd. Co.*, 76 N. Y. 125, 132. "The fact that the plaintiff was a minor I do not think affects the question. There are many expressions of judges, that the assumption by employees of the risks incident to the business and the negligence of co-servants arises from an implied agreement to that effect. In others the modified liabilities of principals to employees are founded upon considerations of public policy. At all events it is an element

of the employment. If a minor engages to work, the risks of the business are incident to the work. He cannot claim on account of infancy to be relieved from the consequences of such risks. He might as well claim to enforce the contract for his wages without performing any service. If a child of unsuitable age should be employed in a hazardous business, or exposed to unsuitable risks, a different question might be presented. Here no question is made but that the plaintiff was competent for the service which he was employed to render, and no negligence is imputed to the defendant for employing him on that account. So in considering the question of contributory negligence, the age and experience of the plaintiff, is often a material consideration, but there is no such point involved in this case."

The preponderance of authority supports the view advanced in this case—that the infancy of the employee does not enable him to repudiate his implied assumption of all patent risk incident to his employment: *Anderson v. Morrison*, 22 Minn. 274; *King v. Boston, &c., Rd. Co.*, 9 Cush. (Mass.) 112; *Reardon v. New York, &c., Co.*, 51 N. Y. Sup. Ct. Rep. 134. But see *contra*, *Beach* Contrib. Neg. p. 360.

II. Does the infancy of the employee, using the word infancy in its strict legal sense, have any effect upon the master's liability to him for personal injuries? It is thought that it does not. The fundamental rule of law governing the master's liability to his employee for personal injuries received by the latter in the course of his employment is that the servant assumes the patent risks of his employment. Related to this rule of law, is the rule of law that it is the duty of the master to point out and explain to the person seeking employment such risks of the employment which the master knows of which are not patent.

We must now endeavor to define what is meant by a "patent" risk, and what is the extent of the master's duty to point out and explain risks that are not patent. It is thought that the word "patent," as used in the rule of law above stated, means apparent or obvious to a person of the degree of intelligence and judgment which the master is justified in assuming the person seeking employment to be, judging from his own knowledge of the person, or, in the absence of such knowledge, from the general appearance of such person. The word does not mean obvious or apparent to a person of average intelligence and judgment. It is used relatively, not absolutely. Similarly the duty of the master to explain non-patent dangers is relative and not absolute. It is his duty to make such explanations of hidden dangers as would be sufficient to bring the nature and extent of such dangers

home to the understanding—not of the man of average intelligence and judgment, but to a person of the degree of intelligence and judgment, which the master, taking into consideration his knowledge of the capacity of the person seeking employment, is justified in assuming him to possess.

Let us now revert to the question proposed at the outset: Does the infancy of the employee (using the word infancy in its technical sense) affect the master's liability to him for personal injuries received in the course of his employment? It is clear that it does not. We have seen that the infancy of the employee does not enable him to repudiate his implied assumption of the patent risks of his employment. It could have no other effect upon the master's liability unless the law should assume arbitrarily that no infant was possessed of the same degree of intelligence and judgment as an adult, and should accordingly hold that dangers which would be patent to an adult of average intelligence and judgment would be non-patent to any infant no matter how intelligent, as a matter of fact, he might be—that risks patent to an adult of twenty-one years and one month are not patent to an infant of twenty years and eleven months. But the law makes no such arbitrary assumption against the intelligence of an infant, as far as the rule of law governing a master's liability to a servant for personal injuries are concerned. It makes no special rule for the case of infant employees. In determining the fact whether a given risk was patent or not, or the sufficiency of a master's explanation of hidden dangers, the law looks alone to the degree of intelligence and judgment which the master is justified in assuming the person seeking such employment to have. The question of the patency of the risk, or the sufficiency of the master's explanation, is in doubtful cases one of fact for the jury, and in passing upon this question they must con-

sider the fact that the employee injured was of immature age, not necessarily as a controlling fact in the case, but in connection with the other facts of the case bearing upon the capacity of the employee. (Of course the immaturity of the employee's age is not material, except so far as it is known to the master, but ordinarily this fact if it exists will be disclosed by the employee's appearance.)

The following authorities, which all relate to injuries caused by machinery, it is thought fully bear out the views above expressed.

In *Williams v. Churchill*, 137 Mass. 243; s. c. 50 Am. Rep. 304, the plaintiff was injured by becoming entangled in the loose end of a rope which he was engaged in making fast around a cleat in the bow of a tug boat on which he was employed. The plaintiff was an infant. HOLMES, J., delivering the opinion of the court said: "It was urged that the plaintiff was under age and inexperienced and that the behavior of the loose end of a taut rope was a hidden danger. But the plaintiff was over nineteen years old, had lived on the sea shore all his life, had been to sea three summers, and had been on this boat four months, the time which it took his brother to become familiar with the duties on board and to get promoted. Taking these facts, in connection with the nature of the employment which he had accepted; the master had a right to assume that the plaintiff knew how to handle a line, and to order him to do so without special warning or instruction." See also *Grizzle v. Frost*, 3 F. & F. 622; *Rd. Co. v. Fort*, 17 Wall. (U. S.) 554; *Fones v. Phillips*, 39 Ark. 17; *Coombs v. Cordage Co.*, 102 Mass. 572.

In *Anderson v. Morrison*, 22 Minn. 274, the defendant had employed the plaintiff, a boy of fourteen, to work in and about an elevator in his cotton mill. Subsequently he set plaintiff at work in running a picking machine. The danger attending work at the picking machine

was greater than that attending work at the elevator. The court held that the defendant was not necessarily derelict in setting plaintiff at the more dangerous work. They say: "If an employer should set an adult, who had capacity to take care of himself, and who knew the risks, to do a dangerous work, of course the employer would not be liable for an injury occurring to the employee in doing the work. And it would be the same if the employee were a minor, but of sufficient capacity to avoid the danger, and who knew of the danger to be avoided." See *King v. Boston, &c., Rd. Co.*, 9 Cush. (Mass.) 112; *Curran v. Merchants' Mfg. Co.*, 130 Mass. 374.

In *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548, the court, after laying down the general principle that a servant with knowledge of the risks of his employment assumes such risks, say: "We need hardly remark, that as this distinction rests upon knowledge in the employee, it is quite obvious that he must have mind sufficient to acquire the necessary knowledge. How the fact was in the present case (the plaintiff being ten years old), we will not undertake to decide. If the fact was important we think it should have been submitted to the consideration of the jury. Nor will we say whether it is proper or not to hold that a child of sufficient age to be employed in the business of a mill for reward, is mature enough to appreciate the hazard of his employment. We make the suggestion for what it is worth should the cause come to another trial."

So in *Sullivan v. India Mfg. Co.*, 113 Mass. 396, the court say: "It may frequently happen that the dangers of a particular position for, or mode of doing work, are great, and apparent to persons of capacity and knowledge of the subject, and yet a party from youth, inexperience, ignorance, or general want of capacity may fail to appreciate them. It would be a breach of duty on the part of a master to expose a servant of this

character, even with his own consent, to such dangers, unless with instructions or cautions sufficient to enable him to comprehend them, and to do his work safely. It was, therefore, competent for the plaintiff to show that there had been such a breach of duty on the part of the defendants, and although he had in fact gone to work in the place pointed out, assenting so to do, yet that he was incapable of appreciating the dangers to which he exposed himself, or of doing the work safely without instructions or cautions which he did not receive." See also *O'Connor v. Adams*, 120 Mass. 427; *Parkhurst v. Johnson*, 50 Mich. 70; s. c. 45 Am. Rep. 28; *Reardon v. New York, &c., Co.*, 51 N. Y. Sup. Ct. R. 134; *Costello v. Judson*, 21 Hun (N. Y.) 396; *McGinnis v. Canada Southern Bridge Co.*, 49 Mich. 466; *Hill v. Gust*, 55 Ind. 45.

In *Swoboda v. Ward*, 40 Mich. 420, it was held that the mere fact that the employee knew of the exposed and dangerous position of certain machinery did not necessarily preclude a recovery. The court say: "Even if he (the employee) had known of the cogs and their unguarded condition, it would not thereby conclusively follow that he could not recover. Other facts and circumstances would have to be considered in connection therewith; his age, his intelligence, his experience and such like, so that the jury might ascertain and determine whether he fully understood and appreciated

the danger." See *Howard Oil Co. v. Farmer*, 56 Tex. 301.

In *Fones v. Phillips*, 39 Ark. 17, it was held that an instruction, "where a child is employed at or about dangerous machinery, it is the duty of the employer to see that he is of sufficient age and intelligence to understand the nature of the risks to which he is exposed. And it is the further duty of the employer to explain to him the risks reasonable to be apprehended, in such a manner as to enable a person of his youth and capacity, to intelligently appreciate the nature of the danger ordinarily attending its performance, and a failure to do this would be a want of ordinary care in the employer. And it is for the jury under all the circumstances of the case at bar, to say whether the defendants have discharged their duty in that behalf, and if not they were guilty of negligence. And in determining this question, the jury should, together with the other facts proven, take into consideration the age, capacity, intelligence and character of the injured party," was a correct statement of the abstract law, although improper in that particular case, as the evidence clearly showed that the plaintiff, who was a minor, had been fully instructed as to the dangers of the machine by which he was injured, and was of sufficient intelligence to comprehend the nature of the risks of his employment.

LOUIS M. GREENLY.

Chicago, Ill.

Court of Errors and Appeals of Delaware.

WILLIAM H. SWIFT, PRESIDENT OF THE DIAMOND MATCH COMPANY, v. THE STATE OF DELAWARE, ex REL. DAVID M. RICHARDSON.

A foreign corporation transacting business in a state, submits itself to the law of that state, and its resident officers, may be compelled by mandamus, to allow a stockholder to inspect and take copies of corporate books and papers in the possession of such officers.

Such a writ may be granted at the suit of a stockholder, who is neither a resident

of the state where the corporation was incorporated, nor of the state where the writ is asked for, and when the inspection is asked for in aid of a suit, in a foreign state, between a stockholder and a third person, to which suit the corporation is not a party.

R., a resident of Michigan, filed a petition in a Delaware court, against S., president of the D. Company, S. being a resident of Delaware, and the D. Company being a corporation of the state of Connecticut, doing business in Delaware. The petition asked for a mandamus to compel S. to allow R., who was a stockholder of the D. Company, to inspect and make copies of certain books and papers of the D. Company, in the possession of S., and which R. desired for use in a suit in the state of Michigan, between R. and a third person : *Held*, that the court had jurisdiction ; that the corporation was not a necessary party, and that as R., as a stockholder, had a right to inspect the corporate papers material to his suit, in the possession of S., the mandamus should be granted.

ERROR to New Castle County.

Mandamus. At the May Term, A. D. 1884, of the Superior Court of the state of Delaware, in and for New Castle county, David M. Richardson presented his petition to the court for a writ of mandamus against William H. Swift, President of the Diamond Match Company, of which Richardson was a stockholder, to compel inspection and liberty to take copies of certain books and papers of the company in the custody of Swift, in the city of Wilmington, in the state of Delaware, the inspection having been allowed, but copies denied.

The relator claimed the inspection and copies for use in a suit pending in the state of Michigan, of which he was a resident, the history and character of which suit is as follows : Mr. Richardson, a large stockholder of the Diamond Match Company, in 1879 and 1880 entered into contracts with Christian H. Buhl and Russell A. Alger, of Detroit, by which Russell and Alger were to become surety for Richardson to the United States on his bond for match stamps, and also to endorse certain notes of Richardson, who thereupon transferred a large block of stock of the Diamond Match Company to Russell and Alger, as collateral security, and they were to receive a proportion of the net earnings of the stock pledged, and not merely of the dividends declared on the stock. It was agreed that on such settlement no loss that may be charged on account of the purchase and sale by the company of other match factories should be taken into account, and that the earnings were to be estimated from the trial balances or books of the company, and allowance was to be made for loss or shrinkage in value of the company, and consideration taken of the improvements made out of the earnings.

In September 1883, Messrs. Buhl and Alger advertised the stock at public sale, claiming that although their liability on the bond had ceased, and all the notes which they had endorsed for Richardson had been paid by him, yet that there was still due them about \$60,000, for net earnings of the Diamond Match Company during 1881 and 1882. Mr. Richardson denied this liability, and filed a bill in equity in the Superior Court of Detroit for an injunction to restrain the sale, and for an accounting of the amount due Russell and Alger under the contract. The case in Michigan is at issue and ready for proofs to be taken.

It is for use as evidence in this suit that Mr. Richardson desires to have copies of certain books and papers, the right to take the copies having been refused by Mr. Swift by order of the board of directors of the company.

The petition of the relator alleges that he is a resident of Michigan, and that the Diamond Match Company is a corporation organized under the laws of the state of Connecticut; that the suit in Michigan relates wholly to, and involves the necessity of ascertaining what were, the true net earnings during the years 1881 and 1882, and what deductions from the earnings were proper to be made on account of loss and shrinkage of the property of said company, and what sums should be charged for improvements and expenditures necessary to be made in order to enable said company to make such earnings or profits; and that it is necessary for him to have access for this purpose to certain books, &c., and to certain instruments of purchase and sale during those years, and to certain bonds, contracts and agreements not to engage in the business of making matches entered into and paid during those years.

That said instruments, &c., are not now kept in Connecticut, but are now in the custody and control of the respondent in the city of Wilmington, the place of residence of Swift.

The relator further avers, that he wishes the inspection not from any idle curiosity or for any improper purpose, but solely because the books, &c., furnish the best evidence and in many cases the only evidence of the facts shown thereby; that said facts are material and necessary in his suit, and that he cannot safely proceed to a hearing without such evidence; and the petition concludes with a prayer for liberty to inspect and make copies of certain specific instruments, &c., relating to the business of the company during the years 1881 and 1882.

On filing the petition the usual rule to show cause issued, and the respondent filed a motion to quash the said rule for the reasons that the company was a corporation organized under the laws of Connecticut, and as such not subject to the jurisdiction of the court; and for the further reason that the rule was issued against the respondent by the designation of the president, and not against him as a public officer recognised by the laws of this state as charged with any public duty by the laws of this state.

Subsequently the respondent was directed to answer the rule, and an agreement was made in open court that the motion to quash should be heard at the time of the hearing of said rule, as if no answer had been filed; and if upon the hearing of the said motion and rule the court should be of opinion that a writ of mandamus should be granted, that a peremptory writ and not an alternative writ should be issued.

The material parts of the answer are stated in the opinion of Chancellor SAULSBURY.

The case was argued at the November Term of the Superior Court by *William C. Spruance*, of Wilmington, and *George V. N. Lothrop* and *William M. Lillibridge*, of Detroit, for the relator, and *George Gray* and *Benj. Nields*, of Wilmington, for the respondent.

At the February Term the rule was made absolute, and it was ordered by the court (COMEGYS, C. J., and HOUSTON, J., concurring, and WOOTEN, J., dissenting), that a peremptory writ of mandamus issue against the respondent as prayed for.

A writ of error was taken on this judgment to the Court of Errors and Appeals, consisting of Chancellor SAULSBURY, and HOUSTON and GRUBB, JJ., and argued at the June Term 1886 by

Gray and *Nields*, for the plaintiff in error, and

Spruance and *Lillibridge*, for the defendant in error.

The opinion of the court was delivered by

SAULSBURY, Chancellor.—The case comes before us upon a writ of error to a judgment of the Superior Court of this state, in and for New Castle county, in favor of David M. Richardson against William H. Swift, President of the Diamond Match Company.

Richardson was the holder and owner of shares of stock in the Diamond Match Company, a corporation under the laws of Connecticut. Swift was a director and president of said company and resides in this state.

As a stockholder in said company, Richardson applied to Swift for permission to inspect and take copies of certain papers and documents in his possession, for a purpose which he alleged was necessary and proper and material to his interest as a stockholder in said company. Inspection was not refused, but permission to make copies or memoranda of said papers and documents was refused. Thereupon Richardson presented his petition to the court below, praying said court to award a writ of mandamus against Swift, commanding him to suffer and permit said Richardson to inspect and make copies of the instruments, books, papers and writings in his custody or control belonging to the said Diamond Match Company, to wit: 1. All contracts and agreements for the purchase by or on behalf of the said Diamond Match Company of match factories and other property relating to the same prior to January 1st 1881. 2. All instruments in writing conveying or assigning to said company or other persons in its behalf property, rights or franchises relating to the manufacture of matches prior to said last-mentioned day. 3. All contracts, agreements or conveyances relating to said purchase of property by or on behalf of said company, other than for materials or supplies in the usual course of its business prior to said last-mentioned day. 4. All bonds, contracts and agreements not to engage in the match business made to or with said company prior to said last-mentioned day. 5. All books, papers and writings of said company, showing the net earnings of the company for and during the years 1881 and 1882.

To Richardson's petition Swift filed an answer, in which he does not deny that the papers and documents mentioned in Richardson's petition and sworn to be in his possession, were in his possession at the time of the service of the writ, or were then in his possession, but states, "that the law of the said state of Connecticut under which said corporation was created and exists provides, that 'the statements and books of every such corporation shall be kept in the town where it is located, and shall at all reasonable times be open to the inspection of its stockholders, and as often as once in each year, a true statement of the accounts shall be made and exhibited to the stockholders.' And the said law further provides, 'that the president and treasurer of every joint stock corporation shall annually, on or before the 15th day of February or August, lodge with the town clerk of the town in which said corporation is located, a certificate signed and sworn to by him, showing

the condition of its affairs as nearly as the same can be ascertained on the 1st day of December or January, or on the 1st day of June or July next preceding the time of making such certificate in the following particulars, to wit: 1. The amount of the capital stock actually paid in; 2. The cash value of its real estate; 3. The cash value of its personal estate, exclusive of patents; 4. The amount of its debts; 5. The amount of its credits; 6. The name, residence and number of shares of each stockholder."

The defendant Swift also in his answer says: "That in conformity to the provisions of the said law as aforesaid, the statement and books of the said corporation have been and are now kept in the town of New Haven, where it is located as aforesaid, and have been at all times, and are now, open to the inspection of any of the stockholders, and that in the month of February in each year since the organization of said corporation, the certificates required by said law as aforesaid, signed and sworn to by the president and treasurer of the said corporation, have been duly lodged with the town clerk of said town of New Haven, and duplicates thereof, made and sworn to as required by said law, have been lodged by them as aforesaid with the secretary of the said state of Connecticut; and that in all respects the requirements of the said law as set forth in the relator's exhibit 'B' have been fully and faithfully complied with by the said corporation and its officers, and that the said statements and books were not, at the time of the filing of said petition, or at any time since, in the custody or possession of the said William H. Swift."

Now it will be observed that the relator's exhibit "B" in respect to which Swift in his answer says that the requirements of the law have been fully and faithfully complied with by the said corporation and its officers, relates only to, 1. The amount of the capital stock actually paid in; 2. The cash value of its real estate; 3. The cash value of its personal property exclusive of patents; 4. The amount of its debts; 5. The amount of its credits; 6. The name, residence and number of shares of such stockholders. And it was in reference to these that Swift says, 'that the said statements and books were not at the time of the filing of the said petition, or at any time since, in the custody or possession of the said William H. Swift.'"

He nowhere makes a similar declaration in respect to the documents and papers, an inspection of which, and the privilege of

making copies of which, was demanded of him by the relator, and the privilege of taking copies of which was refused by him. This will appear manifest from the answer of Swift to the petition filed in the court below. He therein says that, "this respondent is without authority from said corporation to permit, and is expressly prohibited by said corporation from permitting the said relator to make copies of its books, papers or instruments of writing, which may be in his custody or control as president of said corporation, for the purposes mentioned in said petition, unless required so to do by the laws of the state of Connecticut, under which the said corporation exists."

He further says, "that to allow copies of all the instruments, bonds, contracts, agreements, books, papers or writings belonging to the said corporation, and mentioned in said relator's petition, to be made by the relator for use and publication in his said suit, would greatly impede, hinder and obstruct the conduct of the business of the said corporation, and injure and greatly damage the interests of the same, and of its other stockholders."

From this also it appears that the papers and documents mentioned in the relator's petition as in the possession of the said Swift, and the privilege of taking copies of which was demanded by him, and refused by the said Swift at the city of Wilmington, where they were in said Swift's possession, were not the same as those required to be kept in New Haven by the act of the state of Connecticut under which the Diamond Match Company was organized, and were not the same statements and books as those mentioned in the relator's exhibit "B," which Swift in his answer says were not at the time of the filing of the said petition, or at any time since in the custody or possession of the said William H. Swift.

When Swift says, "that the said relator has been furnished with statements showing fully and accurately what were the net earnings of the said corporation during the years 1881 and 1882, and has been permitted by the said corporation full and free access to all books, accounts, bonds and paper mentioned in his petition, and to inspect the same personally, or by his attorney," he nowhere denies that demand was made upon him by the relator for permission to make copies of the books, accounts, bonds and papers, and that such demand was refused by him.

The right to make copies and to make abstracts and memoranda of documents, books and papers by a stockholder in an incorporated

company, is as full and complete as the right of inspection thereof. David M. Richardson, the relator, a resident of the state of Michigan, was and is a stockholder of the Diamond Match Company, a corporation created under the laws of the state of Connecticut. William H. Swift, a resident of the city of Wilmington, in the state of Delaware, was and is a stockholder in the said corporation, and president thereof.

There was and is no law of the state of Connecticut, requiring that the president of said corporation should be a resident of the state of Connecticut.

There was and is no law of said state, requiring that the papers and documents mentioned in the relator's petition should be kept in New Haven, or in the state of Connecticut. They were in fact kept in the city of Wilmington, in the state of Delaware, and in the possession of William H. Swift, at the time of the demand and refusal of the privilege of copying the same, and are there yet in the same possession so far as we know from anything in this case.

The grounds upon which the awarding the mandamus was resisted in the court below, and upon which the reversal of the judgment below is asked in this court, are sufficiently stated in the answer of Swift, and are as follows: "And the said William H. Swift further says that the said David M. Richardson and the said Christian H. Buhl and Russell A. Alger are all residents of the state of Michigan, and the controversy and suit pending between them, as appears from the said relator's petition and exhibits filed, arises upon a contract entered into between them in the said state of Michigan, and which was made with respect to the laws of the said state; and the said controversy and suit do not arise upon any contract or engagement entered into in the state of Delaware, or with respect to the laws thereof.

That the said controversy or suit is not with or against the said corporation, or for the purpose of establishing or maintaining any right of the said relator as a member of the said corporation; or compelling the exercise or performance by any officer thereof of any corporate function or duty.

And that the suit or controversy does not arise out of or upon any contract or engagement by or on behalf of said corporation, or out of or by reason of any duty imposed by law upon said corporation, and that the said corporation is not a party to said suit or

interested therein, and can in no wise be affected by its determination.

That this respondent is without authority from said corporation for permitting said relator to make copies of any of its books, papers or instruments of writing, which may be in his custody or control as president of said corporation, for the purposes mentioned in said petition, unless required so to do by the laws of the state of Connecticut under which the said corporation exists. That to allow copies of all the instruments, bonds, contracts, agreements, books, papers or writings belonging to the said corporation, and mentioned in said relator's petition, to be made by the relator for use and publication in his said suit, would greatly impede, hinder and obstruct the conduct of the business of the said corporation, and injure and greatly damage the interests of the same and of its other stockholders.

A mandamus may be defined to be a command issuing from the Superior Court, directed to some person, corporation or inferior court, within the jurisdiction of the superior court, requiring them to do some particular thing therein specified which by law they are bound to do, and which a superior court has previously determined, or at least supposes, to be consonant to right and justice.

It is unnecessary for the purposes of this case to trace the origin and history of the writ of mandamus. While it is true that in England it was originally what is called a "prerogative writ," and is there generally treated as such, in this state, and in this country, it is simply a writ divested of all its prerogative features, for the enforcement of a remedy by a person having a legal right against another person withholding that right. Prerogative writs, as such, may be said to have no existence in this state, or in this country.

The writ of mandamus, and the right to it in all cases to which it is applicable, is as clearly recognised in our jurisprudence as any other writ which may be issued out of the courts of law to which a party may be entitled.

A clear recognition of this as settled law will go far to divest the character of the writ of much seeming mystery or obscurity of meaning with which it has been customary to surround it, and will greatly simplify the issue involved in this cause, which is nothing more nor less in its nature or character than a suit at law between one person as plaintiff and another as defendant.

Thus considered, the only questions for us to decide in this case

are, has David M. Richardson, the plaintiff, shown a clear right against William H. Swift to be permitted by him to inspect and take copies of the papers in the petition mentioned? Has he made demand and been refused the privilege of so doing by said Swift? Has he any other remedy, or is the writ of mandamus his only specific remedy for the enforcement of a clear right which has been denied him? Has he no other adequate or specific legal remedy to compel the inspection, and the right to take copies of the papers and documents mentioned in his petition? Has the relator shown a clear legal right to the particular thing which he has demanded? Has the right been refused by William H. Swift? Did Swift act wrongfully and illegally in refusing the relator's right, and is there no other way in which the relator can legally enforce his right, except by the writ of mandamus?

These are the questions, and the only questions which are necessary to be decided by us.

The writ of mandamus only issues where there is a clear and specific legal right to be enforced, or a duty which ought to be, and can be performed, and where there is no other specific and adequate legal remedy. The right which it is sought to protect must, therefore, be clearly established, and the writ is never granted in doubtful cases. The exercise of the jurisdiction to grant it rests, to a considerable extent, in the sound discretion of the court, subject always to the well-settled principles which have been established by the courts.

The test to be applied in determining the right to relief by mandamus, is to inquire whether the party aggrieved has a clear legal right, and whether he has any other adequate remedy, since the writ only belongs to those who have legal rights to enforce and find themselves without an appropriate legal remedy. "In such case," says High, "the right to the extraordinary aid of a mandamus may be regarded to that extent as *ex debito justitiæ*." The relator must show not only that he has a clear legal right to have the particular thing in question done, but also the right to have it done by the person against whom the writ is sought.

A corporation may have a mandamus to compel the custos of corporate documents to allow him an inspection, and copies of them, at proper times and on proper occasions, he showing clearly a right on his part to such inspection and copies, and refusal on the part of the custos to allow it: *Angel and Ames on Corp.* 775, and notes

of authorities cited; High on Injunctions. Indeed, upon this point the authorities are uniform, and I shall not burden this opinion with the citation and examination of the numerous authorities which have established it as settled law.

Swift never in his answer objects that the corporation, The Diamond Match Company, is not a party to the proceeding. He nowhere denies that he is the custos of the papers, documents, &c., an inspection and copies of which has been demanded of him, and been refused by him. If he was such custos, it was not necessary, in my opinion, that the corporation should have been a party to the proceedings. Had the corporation been created by the laws of this state it would not have been a necessary party to these proceedings. "Indeed," says Angel and Ames on Corp. 775, "it (mandamus) lies to any person who happens to have the books of the corporation in his possession and refuses to deliver them up." And High, sect. 31, says, which is more pertinent to the point under consideration, "as regards the person to whom the writ should be directed, where an inspection of corporate records is sought, the proper practice is to address it to the one actually having the custody of the books and records, even though it is merely a ministerial officer acting under the direction of others, as in the case of a bank cashier acting under a board of directors. In such case the rule applies that the writ should run to the particular person who is to perform the act required, and the cashier having charge of the books, his refusal to allow the inspection is his individual act, and the writ is therefore properly addressed to him, though there can be no impropriety in such case in directing the writ also to the board of directors."

If the writ should be addressed to the one actually having the books and records, even though he is merely a ministerial officer acting under the direction of others, as a cashier of a bank acting under the board of directors (12 Wend. 183), it would seem that the corporation was not only not a necessary party, but should not be a party according to such practice, although the addition of the corporation or including it in the rule would not vitiate the proceedings, and the reason is this, that while the custos would be the party to whom the writ should be addressed, he having the books, papers, &c., in his possession, there would be no impropriety in allowing the corporation, whose agent the custos was, to answer the rule, and show cause, if they could, why their agent should not be

compelled by the writ of mandamus to allow the inspection and copies of the same. Taking this, therefore, to be the proper practice in cases where the custos is in possession of the documents and papers an inspection and copies of which are demanded, and in cases where the corporation is a domestic one, can there be any reason why the rule should be different where the corporation is a foreign one, the custos being domiciled in this state, and having possession of the books, papers and documents by authority of the foreign corporation? I can see none. Swift in his answer says, "that the said Diamond Match Company is a corporation created by and existing under the laws of the state of Connecticut, and is not a corporation created by or existing under any law of the state of Delaware, and that the same is located in the town of New Haven, in the state of Connecticut, though it does hold real and personal property in the state of Delaware, and transacts business incidental to its business within the state of Connecticut."

Now if it holds real and personal property in the state of Delaware and transacts business incidental to its business within the state of Connecticut, it holds such property and transacts such business by the comity of the state. Its president lives here and is the custos in fact of the documents and papers, an inspection of which, and the privilege of taking copies of which, the relator seeks. The corporation itself does business here, not as a corporation created by the state of Delaware, but as a foreign corporation created by the law of Connecticut.

What results from this? That acting here as a foreign corporation, and holding real and personal property, and doing business as such within this state, it submits or subjects itself to the law of the state in the same manner and to the same extent, in respect to such property and business, as it would be bound to do were it a corporation created by the state of Delaware, and owes obedience and subjection to the mandates of its courts in these respects as fully as if it were a domestic corporation.

Was William H. Swift the legal custos as well as the custos in fact of the documents and papers, an inspection and copies of which the relator seeks? No act of the legislature of Connecticut, and no by-law or rule of the corporation has been produced showing that provision was therein made for the custody of said books and papers. Nothing has been shown us which requires said documents and papers to be kept within the state of

Connecticut. They have not been shown to have been in the possession of any other person than William H. Swift. William H. Swift has for many years resided, and still resides, in the city of Wilmington, in the state of Delaware. He has, and ever has had, the actual possession and control of the same as far as their history has been made known to us. His possession of them is not to be presumed unlawful, but is I think presumed to be lawful.

Service of the rule was made upon him and an answer to it was made by him. He signs himself to said answer as William H. Swift, President of the Diamond Match Company. Now suppose Mr. Richardson, the relator, instead of being a citizen and an inhabitant of the state of Michigan, was a citizen and inhabitant of the state of Delaware, and a stockholder in the Diamond Match Company, could any one reasonably doubt that the courts of Delaware would be competent to afford him the relief he asks by granting him the State's writ of mandamus? Does the fact that he is a citizen and inhabitant of the state of Michigan affect his rights in this respect? I think not. Has he not the same rights as a stockholder in the company to the inspection and copies of the books, papers and documents in the possession of Swift, who must be presumed to be the agent of the directors of the company in respect to such books, papers and documents, and the custody thereof, and who is in fact the president of the company, as he would have were he a citizen and an inhabitant of the state of Delaware? Has he not the same rights in respect thereto in the courts of Delaware as the citizen and inhabitant of Delaware would have? Sect. 2, Art. 4, of the constitution provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." Among the rights secured, is the right to sue in the courts of any state. This is settled by judicial decisions beyond legal controversy.

It does not matter for the purpose of this case where the said David M. Richardson and Christian H. Buhl and Russell A. Alger reside, nor how the controversy and suit pending between them arises. The question is, has the relator shown a clear right to inspect and take copies of the books, papers and documents mentioned in his petition? It is not material who are the parties to the suit in Michigan, mentioned in the respondent's answer, nor out of what it arises.

The question is, what are the rights of Richardson, the relator,

as against Swift, the respondent, in respect to the papers and documents, of which Swift is the legal custos? It is not in the power of the corporation to prohibit their president and agent from obeying the mandate of the court below. Courts of law are not prohibited from exercising their rightful jurisdiction by such feeble authority, nor will they heed such impotent obstructions. If they have jurisdiction, in all proper cases they will proceed to judgment and execute their judgments in the manner the law provides.

But the respondent says, "that to allow copies of all the instruments, bonds, contracts, agreements, books, papers or writings belonging to said corporation, and mentioned in said relator's petition, to be made by the relator for use and publication in his said suit would greatly impede, hinder and obstruct the conduct of the business of the said corporation, and injure and greatly damage the interests of the same and of its other stockholders." Why awarding the writ of mandamus in this particular case should be attended by such consequences to the corporation is not readily to be perceived. If their transactions have been fair and just in all respects to the members of the corporation and others, it is presumed that such transactions will bear the light of inspection and criticism, without impeding, hindering or obstructing the conduct of the business of the corporation, or injuring it in any respect whatever; but the right of Richardson to the relief he seeks depends not upon the consequences that may result to the corporation, but to the satisfaction of the court that he is entitled to the inspection and copies of the papers mentioned in his petition.

It does not follow that though the court below had the right, and it was their duty to award the writ of mandamus against Swift under the circumstances of this case, that the power of the superior court in respect to a foreign corporation is unlimited, and may be exercised in respect to all matters in which foreign corporations are concerned. The superior court, and even the state of Delaware itself, cannot forfeit the charter of a foreign corporation. They cannot compel the election of a stockholder, nor prevent the removal of one. They cannot, in general, intermeddle with or control the internal concerns of a foreign corporation. Their jurisdiction in respect to such corporations is extremely limited, but they have power to see that the officers, agents and servants of such corporations transacting business in this state by the comity of the state, shall yield obedience to the laws of the state.

I have not made reference to the fact that there is an Act of the Assembly of this state conferring the right on the Diamond Match Company, a corporation of the state of Connecticut, to hold real and personal property, and to transact its business within this state, for although the act is mentioned in the brief of the respondent's attorneys, and referred to in the argument, it is nowhere stated in the record sent up to us from the court below.

The ownership of the property and the transaction of the business of a foreign corporation is admitted by the respondent in his answer. The obligations arising from state comity are the same as those that would arise from such an act of the General Assembly, and would be so regarded by the courts of law.

For the reasons which I have stated I think that the judgment of the court below should be affirmed with costs.

HOUSTON, J., concurred in the opinion of the Chancellor, and GRUBB, J., dissented.

Judgment affirmed.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF ILLINOIS.¹

SUPREME JUDICIAL COURT OF MAINE.²

SUPREME COURT OF MISSOURI.³

COURT OF CHANCERY OF NEW JERSEY.⁴

SUPREME COURT OF RHODE ISLAND.⁵

ACTION. See *Mortgage*.

AGENT. See *Usury*.

ATTACHMENT. See *Insurance*.

BANKRUPTCY.

Property of Bankrupt not recovered by Assignee.—The fact that an assignee in bankruptcy has not recovered the property assigned or realized its money value, within the time limited by the bankrupt law, does not give the bankrupt or his creditors a right to recover the property: *Mount v. Manhattan Co.*, 41 N. J. Eq.

¹ From Hon. N. L. Freeman, Reporter; to appear in 115 Ill. Rep.

² From J. W. Spaulding, Esq., Reporter; to appear in 78 Me. Rep.

³ From T. K. Skinker, Esq. The cases will probably appear in 85 or 86 Mo. Rep.

⁴ From Hon. John H. Stewart, Reporter; to appear in 41 N. J. Eq. Reports.

⁵ From Arnold Green, Esq., Reporter; appear in 15 R. I. Reports.

CONFLICT OF LAWS. See *Husband and Wife*.

CONSTITUTIONAL LAW. See *Municipal Corporation*.

Streets—Grant of Use for Railway—Right of Public to use Tracks.—A city council, under the Illinois Incorporation Act, may grant to private individuals or to a private corporation the right to lay railroad tracks in the streets, connecting with public railway tracks previously laid, and extending to the manufacturing establishments or warehouses of those laying the tracks, but in such case the tracks so laid become, in legal contemplation, part of the railway with which they connect, and are open to the public, and subject to public control in all respects as other railway tracks: *Chicago Dock Co. v. Garrity*, 115 Ill.

The use of the streets of a city, whether for vehicles drawn by animals, for riding upon animals, for footmen, or for the passage of railway cars, must be for the public. No corporation or individual can acquire an exclusive right to their use, or for merely private purposes: *Id.*

Railroad tracks laid on streets of a city, connected with existing railroads, and extending to public warehouses, malt houses, or manufacturing establishments, or to public wharves and landings, are in their nature public and for the public good, and all railroad companies are required by law to permit such connections to be made with their tracks: *Id.*

Restraint of Trade—Ordinance requiring Railroads to Report.—The ordinance of St. Louis, requiring street railroads to make quarterly reports of the number of passengers carried, is not void as being unreasonable or in restraint of trade, and is not in violation of art. 5, of the Amendments of the Constitution of the United States: *City of St. Louis v. St. Louis Rd. Co.*, 85 or 86 Mo.

Local Legislation—Class containing One Member—Judicial Notice of Census.—Where an act provides "that in all counties in this state in which is located a city of over 50,000 inhabitants there shall be, and there is hereby established, a reform school for the punishment, reform and education of juvenile offenders as hereinafter provided," it violates those provisions contained in sect. 53, of art. 4, of the Constitution of this state in relation to the passage of local or special laws. The above law shows that it was designed to operate in the present, and on an existing state of facts, i. e., "in all counties in this state in which is located a city of over 50,000 inhabitants." The court takes judicial notice of the census returns, and it is found that Jackson county is the only county in the state to which the law can be made applicable, or was intended to be applied when the act was passed. This fact is as apparent as if that county were designated by name instead of by a circumlocution: *State v. County Court of Jackson County*, 85 or 86 Mo.

CONTRACT.

Contracts—Bids—Building Committee.—A mere bid in answer to an advertisement for proposals for building does not constitute a contract: *Howard v. Maine Industrial School*, 78 Me.

A conditional acceptance, such as requiring a bond, delays the completion of the contract until the condition is complied with: *Id.*

Where one party, as a corporation, acts through a building committee,
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a majority of the committee must concur in making any contract, or in varying one already made: *Id.*

Agreement to make Bequest.—One G. wrote, in 1869, to his nephew, who was then living in Germany, that if he would come to this country and take care of him and his wife, who were childless, that he would leave him all his fortune; and that otherwise he need expect nothing from him. The nephew came accordingly, and took care of his uncle and aunt for ten years, until the uncle's death. *Held*, that this constituted a contract enforceable by the nephew against the legatees and representatives of the uncle, claiming under a will of the uncle which made no provision whatever for the nephew: *Schutt v. Missionary Soc. of M. E. Church*, 41 N. J. Eq.

CORPORATION. See Contract.

Judgment before Organization—Lien of—Mortgage.—A corporation, colorably organized under the statute, transacted business and incurred debts, on which judgments were recovered. After incurring those debts the corporation perfected its legal organization, and then gave certain mortgages on its property. *Held*, that the judgments were entitled to preference in payment over the mortgages: *Bergen v. Porpoise Fishing Co.*, 41 N. J. Eq.

Railroad—Power to Lease other Road—Right of Dissenting Stockholders.—The statute of 1880, which provides that any railroad may lease, consolidate or merge with any other railroad, does not authorize such lease by the directors against a minority of dissenting stockholders, so far as the latter's rights are affected thereby. That provision is merely a legislative authorization, a concession on the part of the legislature of the power to do that which could not lawfully be done without such authority: *Mills v. Central Rd.*, 41 N. J. Eq.

The sixth section of the general corporation act which provides that the charter of every corporation thereafter granted shall be subject to alteration, suspension or repeal, in the discretion of the legislature, does not incorporate the act of 1880, *supra*, in defendants' charter so as to affect injuriously the vested rights of stockholders: *Id.*

Where there is no legislative authority for ascertaining the damage inflicted upon dissenting stockholders by the majority diverting their vested rights by an illegal lease, and for awarding them compensation therefor, the court will not assume that function, but will annul the lease and restore complainants to their position before those rights were invaded, regardless of the effect of such action upon the lessee: *Id.*

COVENANT.

Party Wall—Agreement to Pay half the Cost—Whether a Covenant running with the Land.—A. and B., the owners of adjoining lots, made a written agreement that A., in the erection of a building on his lot, might place one-half of the wall upon the lot of B., suitable for a party wall, which should continue such forever, to be kept, maintained, repaired and rebuilt at the equal joint expense of both. The agreement also provided that A. should, in the first place, build and pay for the wall, and that before B. should use the same, or any part thereof, he should pay A. the cost of one-half of the wall, and that the provisions

of the agreement should be taken as covenants running with the land, and binding upon the executors, heirs, devisees and assigns of the parties, and all persons having, at any time, any interest or estate in said lots: *Held*, that the agreement of B. to pay A. one-half of the cost of the wall was not a covenant running with the lot of A., but was personal to A., and that he, and not his assignee, was entitled to receive the sum due from B. for his part of the cost, and that the wall, when completed, became the property of each, although A. had the right to retain possession of the whole as a security for the payment of the sum due him: *Gibson v. Holden*, 115 Ill.

DAMAGES. See *Injunction*.

EQUITY. See *Municipal Corporation*; *Receiver*.

Limit as to Amount Involved—Suits under \$50.—Lord Bacon's ordinance, declaring that all suits under the value of 10*l.* shall be dismissed, is in force in New Jersey: *Allen v. Demarest*, 41 N. J. Eq.

In order to justify a dismissal on the ground that the matter in dispute is beneath the jurisdiction of the court, the matter in dispute must be less than \$50: *Id.*

A defendant may avail himself of the objection that the matter in dispute is too trivial to justify the court in entertaining the suit, either by demurrer or by motion on notice: *Id.*

Release to Railroad for Injuries—When set aside.—Where a release to a railroad company for injuries received is brought about by fraud, or where there has been a mistake of such a character as shows that there was no aggregatio mentium, or where an unconscionable advantage has been gained by mere mistake or misapprehension, and where there is no gross negligence on the part of plaintiff, equity will interfere in its discretion, to prevent intolerable injustice: *Blair v. C. & A. Rd.*, 85 or 86 Mo.

When such an instrument is so general in its terms as to release the rights of a party of which he was ignorant, and which were not not in contemplation of the bargain at the time it was made, the instrument will be restrained to the purposes of the bargain, and the release confined to the rights intended to be released: *Id.*

EVIDENCE. See *Husband and Wife*.

Communications between Physician and Patient.—The rule that communications between doctor and patient are confidential and inadmissible as evidence, may be waived by the patient: *Blair v. C. & A. Rd.*, 81 or 82 Mo.

EXECUTOR. See *Usury*.

EXECUTION.

Writ directed to Sheriff of another County—Power of Court in county where levied.—Where a judgment is obtained in S. county, and an alias execution is issued thereon, directed to the sheriff of county B., returnable to the circuit court of the former county, and the sheriff of county B. levied the execution upon lands in that county, and advertised the same for sale, and where the defendant files a motion in the circuit court of county B., to quash the levy, the circuit court of county B. has no

jurisdiction to hear such motion, the proper forum being county S., where the judgment was obtained : *Mellier v. Bartlett*, 85 or 86 Mo.

FORMER RECOVERY.

Judgment in another State—Pleading.—A judgment of the Supreme Court of the City and County of New York, in favor of the plaintiff, is a bar to the further prosecution of an action in Maine, between the same parties, for the same cause, although the action was pending in Maine, when the other action was commenced in New York : *Whiting v. Burger*, 78 Me.

Such judgment may be pleaded specially as a bar to the further maintenance of the action here, or it may be proved under the general issue : *Id.*

HUSBAND AND WIFE.

Proof of Marriage—Certificate—Evidence.—A paper found in the possession of one of the parties to an alleged marriage, or produced by such party, purporting to be a marriage certificate, is admissible in proof of marriage, in civil cases other than actions for seduction, without proof of its genuineness, or that it was given by one acting in an official capacity : *Inhabitants of Camden v. Inhabitants of Belgrade*, 78 Me.

In proof of a disputed marriage in civil suits (other than actions for seduction) cohabitation, reputation, the declarations of the parties—written or oral—and their conduct, and all other circumstances usually attending the marriage relation and indicative of its existence, are admissible in evidence ; and where there is shown to have been cohabitation for some years, and children born to the parties, it is admissible to show what kind of a family the woman had previously belonged to and what kind of a home she had left : *Id.*

Divorce—Decrees of other State Courts.—Courts of other states have no authority to decree a divorce between citizens of this state : *Gregory v. Gregory*, 78 Me.

The courts of this state are not bound by the findings of courts of other states upon the jurisdictional question of residence of the parties : *Id.*

Divorce—Adultery.—If the party suing for a divorce commits adultery, pending the suit, and after answer filed, the defendant will be allowed to recriminate by supplemental answer : *Fuller v. Fuller*, 41 N. J. Eq.

Adultery committed at any time before the final decree is pronounced, constitutes a perfect bar to the plaintiff's action : *Id.*

INJUNCTION.

Suit on Bond—Damages.—Under an injunction bond, with condition that the complainant shall pay such damages as the defendant shall sustain, by reason of the injunction, in case it is finally decided that the complainant was not equitably entitled to the injunction, a defendant is entitled to recover a reasonable amount of counsel fees necessarily expended in getting rid of the injunction : *Cook v. Chapman*, 41 N. J. Eq.

But under such a bond, a defendant is not entitled to recover compensation for the time and service he may have devoted to the case, nor to com-

pensation for the mental strain and anxiety he may have suffered in consequence of the injunction : *Id.*

INSURANCE.

Life Insurance—Lapsed Policy—Change of Beneficiary—Apportionment.—An insurance company, in 1869, issued its policy No. 4091, for one thousand dollars, upon the life of Charles J. Haley, payable to his wife, Julia A. Haley, her heirs, executors, administrators, or assigns, requiring quarterly premiums of four dollars and eighty-eight cents. During her life she paid premiums, amounting to one hundred and sixty-five dollars and ninety-two cents. Upon her death in March 1877, in order that Charles J. Haley might acquire to his own use the benefits of the policy of insurance, he and the company contrived together to allow the policy to lapse from non-payment of premiums, and the company issued to Charles J. Haley a new policy of insurance for the same amount requiring the same quarterly premiums, payable to him or his legal representatives, dated October 12th 1877, numbered 32,705. Upon the new policy, he paid in premiums the sum of seventy-eight dollars and eight cents, and died in September 1881. Policy No. 4091 was not given or assigned to Charles J. Haley, and it was a part of the consideration for policy No. 32,705 : *held*, on a bill of interpleader by the company upon which the respective administrators of the estates of Julia A. Haley and Charles J. Haley were required to interplead, that the insurance money be divided between the administrators in the proportion of the amount of premiums paid by their respective intestates : *National Life Ins. Co. v. Haley*, 78 Me.

Life Insurance—Beneficiary—Trustee Process.—By the terms of a life insurance policy, the insurance company promised to pay the assured, his executors, administrators or assigns, for the sole use and benefit of his four children therein named, and the survivor or survivors of them, the amount expressed in the policy, after deducting therefrom any indebtedness the company might have on account of the contract, within ninety days after notice and proof of death : *held*, 1st. That the insurance, although for the sole use and benefit of the children, was payable, not to them, but by the express terms of the contract, to his own legal representative, who, upon payment of the insurance, would become a trustee under an express trust, of the money thus collected for the *cestuis que trust* ; 2d. That the administrator of the assured was the only proper party who could maintain an action at law upon the contract, the policy having never been assigned, and the assured having died intestate ; 3d. That the insurance company, before payment over to the administrator of the amount due upon said policy, is not liable in trustee process at the suit of a creditor of one of the children named in the policy : *Stowe v. Phinney*, 78 Me.

JUDGMENT. See Mortgage.

Court of Limited Jurisdiction.—Effect of Judgment.—When the jurisdiction over a case, of a court of limited jurisdiction, depends on some fact which can be decided without deciding the case on its merits, the jurisdiction may be questioned and disproved collaterally, although the jurisdictional fact is averred of record and has been on evidence actually found by the court : *Peoples Savings Bank v. Wilcox*, 15 R. I.

But when the question of jurisdiction is so involved in the subject-matter of the suit that it cannot be separately decided, the judgment rendered is conclusive in collateral proceedings : *Id.*

LUNATIC.

Guardian—Right to Carry on Business—Settlement of Account—Liability of Surety.—A guardian of an insane person may carry on the business of his ward, and the money of the ward thus invested is not a breach of trust. Distinction between cases of this nature and the administration of estates of deceased persons pointed out. It is within the power of a probate court to direct the continuance of the business of the ward, and in many cases it is the plain and obvious duty of the court to do so : *State v. Jones*, 85 or 86 Mo.

A reasonable compensation only should be allowed the guardian for conducting his ward's business, and the five per cent. rule should not always be adopted : *Id.*

The annual settlements and orders of approval made thereon by the probate court are competent evidence to show—and here they do show—that the business was carried on under the eye and supervision of the court, and this is sufficient, though no previous order therefor was obtained : *Id.*

Annual settlements of administrators, and of curators and guardians of minors, are not conclusive, but are subject to review and correction at final settlement ; and annual settlements of a guardian of an insane person are of the same nature and are only *prima facie* evidence of their correctness : *Id.*

Sureties in a second bond given by such guardian are not liable for excessive commissions retained by or allowed to such guardian in previous annual settlements under first bond. The general rule is that sureties are not liable for past defaults unless made so by the terms of the bond : *Id.*

This rule evidently applies when the bonds are given under the same appointment or term of office, as well as where there are different bonds under successive appointments : *Id.*

MORTGAGE.

Foreclosure—Subsequent Suit—Assignment for Benefit of Creditors.—Foreclosure without sale is a satisfaction of the debt secured only to the amount of the value of the property taken in foreclosure : *Hazard v. Robinson*, 15 R. I.

When after foreclosure without sale the mortgagee brought suit and obtained judgment, not for a deficiency, but for the whole amount of the debt : *Held*, that obtaining the judgment was presumptively a waiver or disclaimer of the foreclosure and presumptively left the mortgage subject to redemption in equity : *Id.*

A. mortgaged certain shares of corporate stock, which although personalty, were by the charter of the corporation transferable by deed, and then by deed assigned his property for the benefit of his creditors to B. B. conveyed this property to C. by deed setting forth the same trusts as those under which B. had received it from A. C. died : *Held*, on a bill to redeem brought by the administrator of A. that the legal title to

the shares of stock passed to C. and that the personal representative of C. was a necessary party to the suit: *Id.*

Alternative Decree of Foreclosure—Suit at Law on.—On a bill to foreclose, a decree was entered ordering the respondents to pay a certain sum to the complainant within a certain time, and in default of such payment appointing a master to sell the mortgaged premises and to deposit the proceeds in the registry of the court. Subsequently an action of debt on judgment was brought by the complainant against the respondents to recover the sum mentioned in the above decree. The respondents pleaded *nul tiel record*. *Held*, that the action did not lie, the decree being in the alternative and on a bill to foreclose: *Burgess v. Souther*, 15 R. 1.

Foreclosure proceedings in equity are of the nature of proceedings *in rem*, and do not ordinarily act *in personam*: *Id.*

MUNICIPAL CORPORATION. See *Constitutional Law*.

Town—Right to bring Suit—Bill in Equity by.—If a bill in chancery be brought in the name of a town without authority of the electors given at a town meeting, the court may properly dismiss the same on the motion of the defendants, and this the court may do on its own motion, when its attention is called to the fact that the suit is being prosecuted without lawful authority: *Kankakee v. Kankakee and Indiana Rd.*, 115 Ill.

Under the Illinois system of township organization there is no officer or board representing the corporate authority of a town. The electors alone represent it, and they can do so only through town meetings. Therefore, neither the supervisor nor the board of town auditors can lawfully authorize a suit in chancery to be brought in the corporate name of their town, or any other action except in the cases named in the statute: *Id.*

It is probable that in extreme cases of threatened invasion or destruction of the property rights of a town, any tax-payer who might thereby be affected in the burden of taxation may prevent such wrong by injunction: *Id.*

NOTICE.

Real Action—Purchaser pendente lite—H. conveyed to S. a parcel of real estate, the deed for which was not recorded. A third person, who had previously levied an execution upon the same real estate, without notice of the unrecorded deed, brought an action against H. for the possession of the estate. After that action was entered in court, S. recorded his deed: *held*, that S. could be regarded in no other light than as purchaser *pendente lite*: *Smith v. Hodgson*, 78 Me.

A purchaser of real estate *pendente lite*, is chargeable with notice of the character of the suit, and of the extent of the claim asserted in the pleadings, in reference to the title to such real estate, without express or implied notice in point of fact: *Id.*

As such purchaser, he is bound by any judgment that may have been entered against the party from whom he has derived his alleged title, equally as if he had been a party to such judgment from the beginning.

And the litigating parties are exempted from taking any notice of the title so acquired; nor are they obliged to make such purchaser a party to the suit: *Id.*

PARTY WALL. See *Covenant*.

RAILROAD. See *Constitutional Law*; *Corporation*.

RECEIVER.

Joint-Stock Companies.—The plaintiffs, four in number, and the defendants, thirteen in number, are members of an unincorporated joint-stock company; the property of the company at the commencement of the suit consisted of a building, a small amount of furniture and \$82 in money, in all of the value of about \$1100; the stock was divided into \$10 shares, of which the plaintiffs owned twelve shares and the defendants the balance; the building was erected for the use of the Patrons of Husbandry, of which all the defendants are members and the plaintiffs had been members. *Held*, that equity does not require that a receiver should be appointed to sell the property and divide the proceeds among the members of the company: *Hinkley v. Biethen*, 78 Me

TAXATION.

Non-Resident Trustee.—A trustee resident in another state who holds as trustee no property in this state is not liable to taxation in the town where his *cestui* resides in this state: *Anthony v. Caswell*, 15 R. I.

USURY.

Loan by Executor—Receipt of Bonus from Borrower.—An agent for loaning money may take a reasonable commission from the borrower, even with the knowledge of the lender, and still the transaction will not be usurious, though the amount of the interest reserved to the lender be the full lawful interest: *Landis v. Saxton*, 85 or 86 Mo.

An executor is a trustee and cannot speculate with the trust property, or make gains therefrom individually beyond his allowed legal compensation, and it is against public policy to allow him to make commissions over and above that allowed by law by speculating or loaning the trust fund, hence a contract by such trustee for a bonus from a borrower of money of the trust estate is illegal. He cannot hold the money thus illegally made by the use of the trust property, or by the use of his position as trustee. No court will enforce the performance of an illegal contract: *Id.*

WILL. See *Contract*.

Devise—Fee Simple Estate.—Realty was devised to a trustee in fee to pay over the income to certain named *cestuis*, no time being limited during which payment was to continue. Provision was made by the will as to one of the *cestuis* that in case of his insolvency or of an attachment of his equitable estate his right to income should terminate and his share be paid by the trustee to A., B. and C., their heirs and assigns, also that the trustee might, in certain contingencies, pay over to the *cestui* his whole interest in the trust property "in fee simple for his own use" free from all trusts. *Held*, that the *cestui que trustent* took each an equitable estate in fee simple: *Greene v. Wilbur*, 15 R. I.

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NEGLIGENCE IN IMMINENT PERIL.

THE well-settled rule of contributory negligence that a person cannot recover, if it appear that by the want of ordinary care and prudence on his part, he contributed to the injury, or if, by the exercise of ordinary care, he might have prevented the injury, is subject to recognised limitations. One of such limitations is, that if the plaintiff, without fault, is placed, by want of care of the defendant, in such a position that, at the moment and in the face of great and threatening peril, he is obliged to choose between two hazards, and he makes such choice as a person of ordinary prudence and care placed in the same situation might make and is thereby injured, the fact that if he had chosen the other hazard he would have escaped injury, will not relieve the defendant from liability for his own neglect: *Haff v. M. & St. L. Ry.*, 14 Fed. Rep. 558; *Collins v. Davidson*, 19 Ill. 83; *Pennsylvania Co. v. Righter*, 42 N. J. L. 180; *Stokes v. Saltonstall*, 13 Pet. 181; *Siegrist v. Arnot*, 10 Mo. App. 197; *Mark v. St. P., M. & M. Rd.*, 30 Minn. 493; *Gurry v. C., M. & St. P. Rd.*, 52 Ia. 672; *Schall v. Cole*, 107 Penn. St. 1; *Fowler v. B. & O. Ry.*, 18 W. Va. 579; *Lowery v. Manhattan Ry.*, 99 N. Y. 158; *E. T., V. & Ga. Rd. v. Gurley*, 12 Lea 46; *P., C. & St. L. Rd. v. Martin*, 82 Ind. 476; *Rd. Co. v. Mowery*, 36 Ohio St. 418; *Penn. Rd. v. Werner*, 89 Penn. St. 59; *Wilson v. N. P. Ry.*, 26 Minn. 278; *I., B. & W. Rd. v. Carr*, 35 Ind. 510; *Dyer v. Erie Ry.*, 71 N. Y. 229; *M. C. Rd. v. Neubeur*, 62 Md. 391; *Wesley Coal Co. v. Healer*, 84 Ill. 126; *Larrabee v. Sewall*, 66 Me. 376; *Stevenson*

v. *C. & A. Rd.*, 18 Fed. Rep. 493; 5 McCrary 634; *McKinney v. Neil*, 1 McLean 540; *Coulter v. Am. Exp. Co.*, 56 N. Y. 585; *Buel v. N. Y. C. Rd.*, 31 Id. 314; *Bucher v. Rd.*, 98 Id. 128; *T., W. & W. Rd. v. O'Connor*, 79 Ill. 391; *Voak v. N. C. Rd.*, 75 N. Y. 320; *Johnson v. West Chester Rd.*, 70 Penn. St. 357; *Lawless v. Conn. R. Rd.*, 136 Mass. 1; *The B. B. Saunders*, 25 Fed. Rep. 727; *The Genesee Chief*, 12 How. 461; *The Dexter*, 23 Wall. 69, 76; *The Elizabeth Jones*, 112 U. S. 514, 526; *I., B. & W. Rd. v. Carr*, 35 Ind. 510; *Mark v. Hudson R. Bridge Co.*, 56 How. Pr. 108; *Wesley City Coal Co. v. Healer*, 84 Ill. 126; *E. T., V. & G. Rd. v. Clark*, 74 Ala. 443; *B. & O. Rd. v. Trainor*, 33 Md. 542; *Sullivan v. Bridge Co.*, 9 Bush 81; *Cottrill v. Rd.*, 47 Wis. 637.

Lord ELLENBOROUGH said, in *Jones v. Boyce*, 1 Stark. 402, "If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences." To like effect, Chief Baron KELLY, in *Siner v. G. W. Ry.*, L. R., 3 Ex. 150; *The Bywell Castle*, L. R., 4 P. D. 219.

Or, in other words, where a party has given another reasonable cause for alarm he cannot complain that the person so alarmed has not exercised cool presence of mind, and thereby find protection from responsibility resulting from the alarm: *Wesley City Coal Co. v. Healer*, 84 Ill. 126.

Nor is there any rule of law which imposes it upon one over whom danger depends by the neglect of another to incur greater danger by delaying his efforts to avoid it until its exact nature and measure can be ascertained. An instinctive effort on the part of such person to avoid the danger, will not relieve the other from responsibility for his negligence: *Lowery v. Manhattan Ry.*, 99 N. Y. 158; *Coulter v. Am. Exp. Co.*, 56 Id. 585; *Larrabee v. Sewall*, 66 Me. 376.

The limitation of the rule stated is enforced under the varying circumstances justifying its application. It is, in effect, incorporated into the maritime law of all civilized nations, and in the United States, under Rev. Stats. 1878, sect. 4233, as amended by 23 Stats. at Large, p. 442, it is provided that in obeying and construing the rules of navigation governing the movements of vessels, contained in the act, "due regard shall be had to all dangers of navigation, and to any special circumstances which may render a departure from such rules necessary in order to avoid immediate danger."

The limitation is generally applied to errors of navigation by vessels made *in extremis* in attempting to avoid an impending collision. The limitation also applies to acts of passengers or employees on railroad locomotives or trains, in jumping from moving trains, done under the alarm caused by a collision of trains which is taking place or is likely to occur; and of travellers driving or on foot on public highways, when in danger, by the defendant's negligence, of collision, at a railroad crossing, with an approaching train, or upon public streets in a city, and of employees in manufactories or shops, and in other varying circumstances which, with the qualification of such limitation, will be considered in their order.

Collisions of Vessels.—The rule in Admiralty.—The general rule in admiralty, as declared by the Supreme Court of the United States, in several cases, is, that where a vessel has, either wholly or partly, by her own fault or mismanagement, placed another vessel in a position of extreme danger, the other ship will be excused, if in the moment of peril and excitement, in an effort to avoid the impending collision, she makes an error in judgment in manœuvres, contributing to, or inducing a collision: *The Elizabeth Jones*, 112 U. S. 514, 526; *The Genesee Chief*, 12 How. 461; *N. Y. & L. Steamship Co. v. Rumball*, 21 Id. 372, 383; *The Favorita*, 18 Wall. 603; *The Falcon*, 19 Id. 75; *The Nichols*, 7 Id. 656, 666; *The Carroll*, 8 Id. 302; *The Dexter*, 23 Id. 69, 76. Also by federal courts in collision cases: *The Royal Arch*, 22 Fed. Rep. 457; *The E. B. Ward, Jr.*, 23 Id. 900; *The Standard*, Id. 207; *The George Murray*, 22 Id. 117, 123; *The Nereus*, 23 Id. 458; *The B. B. Saunders*, 25 Id. 727; *Collins v. Davidson*, 19 Id. 83; *The John Mitchell*, 12 Id. 511; *Orhanovich v. The America*, 4 Id. 337; *The Alaska*, 22 Id. 548; *The Lavergne*, 2 Id. 788; *The Merrimac*, 2 Sawy. 586; *Bartlett v. Williams*, 1 Holmes 229; *Peck v. Burns*, 5 Ben. 537; *The J. H. Gautier*, Id. 469; *The Elm City*, 6 Id. 58; *The General William McCandless*, Id. 223; *The Manhasset*, Id. 301. As said by Judge MCCRARY, in *Collins v. Davison*, *supra*, "In the case of sudden and unexpected peril, endangering human life, and causing unnecessary excitement, the law makes allowances for the circumstance that there is but little time for deliberation, and holds a party accountable only for such care as an ordinarily prudent man would have exercised under similar circumstances."

The rule applies to all cases where the situation is such that, all

the circumstances being considered, a reasonable doubt might exist as to the best course to be pursued to avoid a collision on the part of those in charge of the vessel in a dangerous situation: *The Nereus*, 23 Fed. Rep. 448, 458. But a vessel which gives a signal to another vessel for a departure from the ordinary rules of navigation assumes the hazards of the consequences of making such a departure, whether she hears a response to the signal or not: *The B. B. Saunders*, 25 Fed. Rep. 727; *The St. John*, 7 Blatchf. 220; and where a steamer, under no constraint of circumstances, proposes such departure, requiring on the part of the other vessel strong and immediate measures to avoid collision, an error of judgment made by the latter, in a moment of peril is no defence: *The Nereus*, 23 Fed. Rep. 456. So, where a vessel, instead of following such rules causes damage by a mistaken manoeuvre calculated on chance, she is responsible: *The Titan*, 23 Fed. Rep. 413, 416. A change of course on the part of a vessel which complied with the rules of navigation until a collision became apparently inevitable by the fault of the other, is not a fault when made at a moment of extreme peril, and is allowable as an act *in extremis*, although if not made, there might have been no collision: *The E. B. Ward, Jr.*, 23 Fed. Rep. 900; *The George Murray*, 22 Id. 123. The rule as stated by the English Court of Appeals in the Admiralty Court in the leading case of *The Bywell Castle*, L. R., 4 Pr. D. 219, where the libelled vessel in a collision changed her course when, as said by Chief Justice JAMES, she was "in her very agony," is, that where a ship has, by wrong manoeuvres, placed another ship in a position of extreme peril, that other ship will not be held to blame if, in that moment of extreme peril and difficulty she happens to do something wrong, and is not manoeuvred with perfect presence of mind, accurate judgment and promptitude. "Although," added Lord COTTON, "those before whom the case comes to be adjudicated, with a knowledge of all the facts, are able to see that the course adopted was in fact not the best."

Collision of Railroad Trains.—The limitation of the doctrine of contributory negligence referred to, applies, also, to passengers upon railroad trains. The rule is applied especially in cases where collisions of railroad trains have taken place or are likely to occur, and the passenger is injured while leaping therefrom. It may thus be regarded as settled law that where a passenger is riding upon a railroad train and a collision has taken place or is likely to occur,

and in the excitement of the moment, in presence of impending peril, without time for deliberation, he is obliged to choose between two hazards, and makes such choice as a person of ordinary care and prudence would make under like circumstances, and by reason thereof he is exposed to greater peril, and injured, he is entitled to recover, the railroad company not being relieved from liability for its own negligence by the fact that the instinctive act of escape from imminent peril by jumping from a moving train was very hazardous and in law negligent, and that had he chosen the other hazard the injury would have been avoided: *N. & C. Rd. v. Erwin*, 3 Am. & Eng. R. R. Cas. 465; *Twomley v. C., P., N. & E. Ry.*, 69 N. Y. 158; *Buel v. N. Y. C. Rd.*, 31 Id. 314; *Eldridge v. Long Island Rd.*, 1 Sandf. (N. Y.) 89; *Collins v. Rd. Co.*, 12 Barb. 493; *Plopper v. Rd. Co.*, 13 Hun 625; *Southwestern Rd. v. Paulk*, 24 Ga. 356; *Wilson v. N. P. Rd.*, 26 Minn. 278; *Hill v. N. O. & G. W. Rd.*, 11 La. Ann. 292; *Rd. Co. v. Aspell*, 73 Penn. St. 149; *Knapp v. S. C. & P. Rd.*, 18 Am. & Eng. R. R. Cas. 60. See *Lowery v. Manhattan Ry.*, 99 N. Y. 158, 162.

The rule was applied where a passenger fearing a collision from an approaching train, left his seat to go out of the train, believing by so doing he could better avoid the danger, and although his act contributed to his injury, it was held no defence to his action: *Iron Co. v. Mowery*, 86 Ohio 418. And also, where, a collision impending, the conductor called to the passengers to jump, and himself set the example: *Southwestern Ry. v. Paulk*, 24 Ga. 356; or where they followed a brakeman: *Filer v. New York Central & H. R. Rd.*, 68 N. Y. 124; *Pittsburgh, B. & W. Rd. Co. v. Bohrman*, 12 Am. & Eng. R. R. Cas. 170.

The rule as to Employees.—A distinction is properly drawn between the circumstances which may justify a passenger in fear of an impending collision, to jump from a moving train, and the like act of an employee, such as an engineer. The former has only his own personal safety in question, while such employee has in his charge the lives and property of all the passengers and employees on the train. The passenger is also unskilled in the running of trains, and as to the imminence of the danger of collision. The engineer, however, knows from experience how soon a train can be stopped, and the danger of risk of collision as judged from the distances between the approaching trains. To justify jumping from his engine in such circumstances, there must be such an im-

minent emergency upon him as requires him to do it; for what would be no fault in the passenger might be gross negligence in the officers of the train: *Central Rd. v. Roach*, 64 Ga. 635. Where, however, a collision was rendered inevitable by the negligence of the employer in retaining an incompetent servant, it was held where an engineer jumped from his engine, that, "if in the excitement of the moment, the deceased lost his own presence of mind, and adopted a mode of self-preservation, which proved most unfortunate for him, it was no excuse to the company, whose negligence in employing or retaining an incompetent servant caused the disaster:" *E. T., V. & G. Rd. v. Gurley*, 12 Lea 46.

The limitation also applies in favor of an employee, where, in the course of his employment, in a position of imminent peril, by the negligence of the employer, he adopts, in the terror of the moment, an unsafe course exposing him to greater peril: *Schall v. Cole*, 107 Penn. St. 1; *Gumz v. Rd.*, 52 Wis. 672; *Schultz v. Chicago & N.W. Rd.*, 44 Id. 638; *Mark v. St. P., M. & M. Rd.*, 30 Minn. 493; *Stevenson v. Chicago & A. Ry.*, 18 Fed. Rep. 493; *Lalor v. Chicago, B. & Q. Rd.*, 52 Ill. 401; *Bell v. Hannibal & St. J. Rd.*, 72 Mo. 50.

In *Schall v. Cole*, *supra*, where the employee unexpectedly found himself in a position of imminent peril in which there was no time for reflection, by reason of the breaking of a part of a machine, the court say: "Assuming it to be true that he might have escaped had he not paused to look after his machine, such an error of judgment at such a time ought not to prevent a recovery." And, in a similar case of imminent peril, the Supreme Court of Wisconsin, in *Schultz v. Chicago & N.W. Rd.*, *supra*, held that "it would be most absurd and unjust to hold him negligent because the instinct of self-preservation did not suggest a more effectual method of escape from peril."

Collisions at Railroad Crossings.—A traveller, on a highway or a city street, approaching a railroad crossing where the view of the track is by any means obstructed so as to render it impossible or difficult to learn the approach of a train, or where there are conflicting circumstances calculated to deceive or throw him off his guard, and who is obliged to act upon his judgment at the moment of peril, caused by the defendant's negligence, in failing to give signals, and who, under such circumstances, acts as would a person of ordinary intelligence, will be entitled to recover, although at the

last moment he be guilty of an error of judgment in his attempting to avoid collision with the approaching train: *Hart v. Devereux*, 41 Ohio St. 565; *Penn. Rd. v. Werner*, 89 Penn. St. 59; *Kelly v. St. P., M. & M. Rd.*, 29 Minn. 1; *Brownell v. T. & B. Rd.*, 55 Vt. 218; *Rosenberger v. G. T. Ry.*, 8 Ont. App. 482; aff. 9 Sup. Ct. Can. 311; *Copley v. N. H. & N. Rd.*, 136 Mass. 6; *Cont. Imp. Co. v. Stead*, 95 U. S. 161; *Plummer v. Eastern Rd.*, 73 Me. 591; *Penn. Rd. v. Coon*, 17 W. N. C. 137; *P. & R. Rd. v. Killips*, 88 Penn. St. 405; *Penn. Rd. v. Beale*, 73 Id. 504; *Bunting v. Rd. Co.*, 14 Nev. 351; *L. & C. L. Rd. v. Goetz*, 79 Ky. 442; *C., B. & Q. Rd. v. Lee*, 87 Ill. 454; *P. & P. Rd. v. Clayberg*, 107 Ill. 644; *Johnson v. Rd. Co.*, 77 Mo. 546; *Richey v. Rd.*, 7 Mo. App. 150; *Zimmerman v. Rd. Co.*, 71 Mo. 476; *Gaynor v. Rd. Co.*, 100 Mass. 208; *Chaffee v. Rd. Co.*, 104 Id. 108; *Pollock v. Rd. Co.*, 124 Id. 158; *Kissenger v. Rd. Co.*, 56 N. Y. 538; *W., St. L. & P. Rd. v. Cent. Trust Co.*, 23 Fed. Rep. 738; *Cosgrove v. Rd. Co.*, 87 N. Y. 88; *Salter v. Rd.*, 88 Id. 42; s. c. 75 Id. 273; *Cordell v. Rd.*, 70 Id. 119; *Dolan v. Del. & H. Canal Co.*, 71 Id. 285; *B. & O. Rd. v. Whitacre*, 35 Ohio St. 627; *Schierhold v. Rd.*, 40 Cal. 447; *Penn. Rd. v. Matthews*, 36 N. J. L. 531; *Gothard v. Rd.*, 67 Ala. 114; *Nehrbas v. Rd.*, 62 Cal. 320; *Faber v. Rd.*, 29 Minn. 465; *Trout v. Rd.*, 23 Gratt. 619; *H. & T. C. Rd. v. Wilson*, 60 Tex. 142; *Funston v. Rd.*, 61 Ia. 452; *Skelton's Case*, L. R., 2 C. P. 631; *Bilbee v. L. & B. Ry.*, 18 C. B. N. S. 584. Even in the absence of statutory requirement to give signals: *Artz v. C., R. I. & P. Rd.*, 34 Iowa 153; *Funston v. C., R. I. & P. Rd.*, 61 Id. 452; *Eilert v. Rd.*, 48 Wis. 606.

And also at private crossings where the same have been opened to the use of the public: *Webb v. Rd.*, 57 Me. 117; *P., F. W. & C. Ry. v. Dunn*, 56 Penn. St. 280; *Delany v. Rd.*, 83 Wis. 67; *Thomas v. Rd.*, 8 Fed. Rep. 729; s. c. 19 Blatchf. 533; *Barry v. Rd.*, 92 N. Y. 289; *Delaney v. Rd.*, *supra*; *Jamison v. Rd.*, 55 Cal. 593; *Murphy v. Rd.*, 133 Mass. 121. Even where the company had put up a sign "This is not a public way, and is dangerous:" *O'Connor v. B. & L. Rd.*, 135 Mass. 352; *Ill. Cent. Rd., v. Frelka*, 110 Ill. 498.

A traveller upon a street in a city, where the speed of trains has been regulated by city ordinance, may presume that the company will comply with such regulation, and if, acting in accordance with

such presumption, in the absence of knowledge that the train approaching was exceeding that speed, he will be excused, in case of collision, if by reason of haste, when placed in a position of impending peril, by the defendant's negligence, he makes a mistake: *Hart v. Devereux*, 41 Ohio St. 565; *Meek v. Pennsylvania Co.*, 38 Id. 632; *E. T., V. & G. Rd. v. Clark*, 74 Ala. 443. He also may presume that a proper lookout will be kept in backing locomotives or cars across streets: *L., N., A. & C. Rd. v. Head*, 80 Ind. 117; *G. H. & H. Rd. v. Moore*, 59 Tex. 64; *Gov. St. Ry. v. Hanlon*, 53 Ala. 83; *Schwier v. N. Y. C. & H. R. Rd.*, 90 N. Y. 558. And where, in obedience to signals or acts of the company's servants at crossings, a traveller places himself in a position of imminent danger of collision, he can recover: *Flushing v. Sharp*, 96 N. Y. 676; *Peck v. M. C. Rd.* (Mich. 1885), 19 Am. & Eng. Rd. Cas. 259; *Bayley v. Eastern Rd.*, 125 Mass. 62; *Sweeny v. Old Col. Ry.*, 10 Allen 368; *Borst v. L., S. & M. S. Rd.*, 4 Hun 346; *Dolan v. D. & H. Canal Co.*, 71 N. Y. 285; *P. & O. Rd. v. Mahone*, 63 Md. 138.

The limitation of the rule stated was enforced in *C. & N. W. Rd. v. Miller*, 46 Mich. 532. The court (Ch. J. MARSTON), in stating the rule said: "If the neglect of the company to sound a whistle, when approaching the highway, permitted the plaintiff to drive into a dangerous position under circumstances which allowed him no time for reflection, and he, acting upon the spur of the moment in his efforts to avoid the danger, made a mistake, and took what subsequent cool deliberate investigation might show to have been wrong, and that some other course would have been better if not absolutely safe, yet he cannot be charged with contributory negligence because of such error of judgment under such dangerous circumstances." And in a late case in Mass. (*Tyler v. N. & N. E. Rd.*, 137 Mass. 238), arising under similar circumstances, the court held that while "the plaintiff was bound to use reasonable care to avoid getting into a position in which he could not escape a collision, the fact that he did find himself there in such a position was not conclusive evidence that he was there by his own negligence:" *Mayo v. Railroad Co.*, 104 Mass. 137. In that case, even the defendant, did not claim that the act of the traveller, in presence of the imminent peril of collision, although negligent, was a defence; and, in *Schum v. Penn. Ry.*, 107 Penn. St. 8, where the view of the road was obscured until about ten yards from the track, and then only

fifty yards of the track could be seen, the train running forty miles an hour, and giving no signals, and the plaintiff's intestate was killed, the court announced that "as matter of law, a man may fairly be presumed to see what he can see when it is his duty to see it, but he cannot be presumed to see at a particular time what is not shown to have been visible at that time." Nor is a degree of care amounting to the utmost coolness and discretion required of travellers finding themselves in positions of peril, by reason of impending collisions caused by the view of the approaching train, being prevented by obstructions placed by the defendant, no signals having been given: *Nehrbas v. Rd.*, 62 Cal. 330; *Rd. Co. v. Sponier*, 85 Ind. 165; *McDermott v. Rd.*, 28 Hun 325; *MacKay v. Rd.*, 35 N. Y. 75; *Dimick v. Rd.*, 80 Ill. 338; *Rd. v. Lee*, 87 Id. 454. And it may be negligence *per se* on the part of a railroad to have a crossing so obstructed that if the plaintiff "had got out and led his horse on the track, the result would have probably been the loss of his own life as well as that of the horse:" *Penn. Rd. v. Ackerman*, 74 Penn. St. 265. Nor is it required of travellers on the highway to measure time and distance with exactness as they approach a crossing, although upon a subsequent measurement by an experienced engineer it may be discovered that an engine might have been seen at certain points in the highway: *Hutchinson v. St. P., M. & M. Rd.*, 32 Minn. 398; nor was it any defence that a girl might have been misled as to distance where she had got to within four or five feet of the track, at a city street crossing, without seeing or hearing a train, and then, being startled by sudden and sharp whistles and seeing the flashing headlight of an engine, in the terror of the moment, without time for reflection, started to run across the track, in front thereof, and was injured: *Copley v. N. H. & N. Rd.*, 136 Mass. 6. So, also, a traveller can recover where, having a right to presume that a railroad company will not exceed the rate of speed prescribed by ordinance, and acting upon such presumption, without knowledge that the rate was being exceeded, was injured while attempting to escape from the perilous position, in which he had been placed by the defendant's negligence: *Hart v. Devereux*, 41 Ohio St. 565; *Meek v. Pennsylvania Co.*, 38 Id. 632; *E. T., V. & G. Rd. v. Clark*, 74 Ala. 443.

Jumping off a moving Train at Stations.—A passenger upon a railroad train who, by the culpable negligence of a corporation,
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through its officers, is induced to leave a train while moving slowly, it having arrived at his destination, but not being entirely stopped, is entitled to recover, for, being called upon to act in a sudden emergency caused by the defendant's negligence, he will not be held to the most rigid accountability for his actions: *Bucher v. Rd.*, 98 N. Y. 128; *Filer v. N. Y. C. Rd.*, 49 Id. 51; *Ernst v. Hudson River Ry.*, 35 Id. 38; *McIntyre v. N. Y. C. Rd.*, 37 Id. 287; *G. & S. A. Rd. v. Smith*, 59 Tex. 406; *Penn. Rd. v. McCloskey*, 23 Penn. St. 526; *Georgia Ry. Co. v. McCurdy*, 45 Ga. 288, in which it is said, "it is not a want of ordinary care for a passenger to use the means the company affords him to get off a train:" *Straus v. Rd.*, 75 Mo. 185; *Vickers v. Rd.*, 64 Ga. 306; *Clotworthy v. H. & St. J. Rd.*, 80 Mo. 220; *Boss v. Rd.*, 15 R. I. 135; *M. & L. R. Rd. v. Stringfellow*, 44 Ark. 32; *T. & P. Rd. v. Garcia*, 62 Tex. 285; *Kelly v. Rd.*, 70 Mo. 604; *Nelson v. Rd.*, 68 Id. 593; *Ohio & M. R. Rd. v. Schiebe*, 44 Ill. 460; *Edgar v. Ry.*, 11 Upp. Can. App. 452; *Siner v. Rd.*, L. R., 3 Exch. 150, 155; *Rd. v. Krouse*, 30 Ohio St. 222; *Ill. Cent. Rd. v. Able*, 59 Ill. 131; *P., B. & W. Rd. v. Rohrman*, 12 Am. & Eng. Rd. Cas. 176. Or where passing from one car to another while in motion, upon the directions of the employees of the train, there being no knowledge that such obedience would lead to danger: *L. & N. Rd. v. Kelly*, 92 Ind. 371. The rule applies where a conductor gives a signal for a train to start, while passengers are getting off of the train, at a station, without notice to them: *Brooks v. Rd.*, 135 Mass. 21; *Rathbone v. Union Ry.*, 13 R. I. 709; *Bucher v. Rd.*, 98 N. Y. 128; *Straus v. Rd.*, 75 Mo. 185; *Rd. v. Krouse*, 38 Ohio St. 222.

The rule applied to Stage-Coaches and other Vehicles.—The rule referred to ante-dated railroads, for the situation of imminent peril that will excuse a person for jumping from a railroad train in motion will equally excuse him where he leaps from a coach or other vehicle while in motion. In the leading case—*Stokes v. Saltonstall*, 13 Pet. 181—where a passenger jumped from a stage, fearing that it would overturn, the court stated the rule: "It is sufficient, if he was placed, by the misconduct of the defendant, in such a situation as obliged him to adopt one alternative, leap or remain in certain peril: *Haff v. Rd.*, 14 Fed. Rep. 558; *McKinney v. Nere*, 1 McLean 540; *Ingalls v. Bills*, 9 Metc. 1; *Seigrist v. Arnot*, 10 Mo. App. 197; *Dyer v. Erie Ry.*, 71 N. Y.

228; and in *Jones v. Boyce*, 1 Stark. 402, the leading English case, Lord ELLENBOROUGH, says: "If I place a man in such a position that he must adopt a perilous alternative, I am responsible for the consequences."

As to occurrences on Streets.—The limitation of the rule of negligence stated is also applied to occurrences on public streets in cities and towns. In a late case in the New York Court of Appeals—*Lowery v. Manhattan Ry.*, 99 N. Y. 158—where, by the fall of fire from a locomotive on the defendant's road, the plaintiff was injured, the court (Judge MILLER), say: "The driver was passing along in pursuit of his customary business driving his horse, when suddenly the falling of the fire upon himself and the horse placed him in a position of great danger, and he was justified in attempting to save his own life and protect himself from injury. If he made a mistake in his judgment, the company was not relieved from liability." The same rule was applied in earlier cases, *Wasmer v. Delaware, L. & W. Rd.*, 80 N. Y. 212, and *Coulter v. Am. M. U. Exp. Co.*, 56 N. Y. 585, and also in *Larrabee v. Sewall*, 66 Me. 376.

A presumption prevails in favor of the foot traveller on the street that he will not, without fault, be placed in peril; and, therefore, it is not negligent for him, in the absence of notice of danger, to permit his attention to be drawn from the spot upon which he is about to step, extraordinary vigilance not being required of him: *Houston v. Traphagen*, 47 N. J. L. 23; *Philbrick v. Niles*, 25 Fed. Rep. 265; *Coulter v. Am. M. U. Exp. Co.*, 56 N. Y. 585.

The rule was also applied to a highway, where a traveller, owing to the negligence of the defendant, was exposed to peril by a precipice left unguarded: *Pittsburgh, C. & Y. Rd. v. Moses*, 17 W. N. C. 76.

Limitation of rule, when avoided.—It is necessary, however, that the situation of peril in which the plaintiff is placed, in order to make his act while there an excusable error of judgment, must be the result of the negligence of the defendant: *The Elizabeth Jones*, 112 U. S. 514, 526. Where, therefore, the plaintiff has, by his own negligence, placed himself in a position of known peril, or where the act of the plaintiff causing his injury resulted from a rash apprehension of danger which did not exist, then, although

in the excitement and confusion, he makes a mistake in his attempt to escape from impending peril, and is exposed to greater danger, the consequences of such mistake cannot be visited upon the defendant, for no degree of presence of mind nor want of it has anything to do with the case, as it was negligence to be there: *Merrill v. Eastern Rd.*, 139 Mass. 238; *B. & P. Rd. v. Jones*, 95 U. S. 439; *Stokes v. Saltonstall*, 13 Pet. 181; *Collins v. Davidson*, 19 Fed. Rep. 83; *Kresanowski v. Rd.*, 18 Id. 229; *Player v. Rd.*, 62 Ia. 723; *L. R. & F. S. Rd. v. Miles*, 40 Ark. 298; *Rucker v. Rd.*, 61 Tex. 499; *Penn. Rd. v. Langdon*, 92 Penn. St. 21; *Gardner v. Rd.*, 51 Conn. 143; *Hickey v. Rd.*, 14 Allen 429; *Ken. Cent. Ry. v. Thomas*, 79 Ky. 160; *Waterbury v. Rd.*, 21 Blatchf. 314; 17 Fed. Rep. 671; *Abend v. Rd.*, 111 Ill. 202; *Rd. v. Michie*, 83 Id. 427; *Hoar v. Rd.*, 70 Me. 65; *Dewille v. Southern Pac. Ry.*, 50 Cal. 383; *B. & M. R. Rd. v. Rose*, 11 Neb. 177; *Eaton v. Rd.*, 57 N. Y. 382; *Siegrist v. Arnot*, 10 Mo. App. 197. The rule applied in admiralty cases: *The Free State*, 91 U. S. 200; *The General U. S. Grant*, 6 Ben. 465; *Sherman v. Mott*, 5 Id. 372; *The Adriatic*, 107 U. S. 512; *The Pilot*, 20 Fed. Rep. 860; *The Eleanora*, 17 Blatchf. 88; *The Rosedale*, 22 Fed. Rep. 737; *The Bermuda*, 10 Ben. 693; *Winter v. Winnett*, 1 Holmes 465; *The Electra*, 6 Ben. 189; *The F. W. Gifford*, 7 Biss. 249.

Although circumstances may arise where a person may, voluntarily and without actual necessity, expose himself to danger, and still not be chargeable with contributory negligence: *Jeffrey v. Rd.*, 56 Iowa 546; *Pool v. Rd.*, 53 Id. 657; *Lawless v. Rd.*, 136 Mass. 1; *Thomas v. W. U. Tel. Co.*, 100 Id. 156; *Mahoney v. Metropolitan Rd.*, 104 Id. 73.

The rule stated is applied to accidents from collisions at railroad crossings. The consensus of judicial opinion in the federal and state courts is, recognising that a railroad crossing is a dangerous place, that a traveller who drives or walks upon a railroad track, without taking any precaution whatever, either to stop, look both ways, or listen for an approaching train, and is injured, is guilty of negligence in law, although the company omitted to give the statutory signals, and that the traveller, in his confusion, in the excitement of the moment, rushed more heedlessly into greater peril: *Schofield v. C., M. & St. P. Rd.*, 8 Fed. Rep. 488; *Cont. Imp. Co. v. Stead*, 95 U. S. 161; *Thomas*

v. *Rd.*, 8 Fed. Rep. 729; 19 Blatchf. 533; *Tucker v. Duncan*, 9 Fed. Rep. 867; *Wheelwright v. B. & A. Rd.*, 135 Mass. 225; *Chaffee v. B. & L. Rd.*, 104 Id. 108; *Tully v. Fitchburg Ry.*, 134 Id. 499; a case of deaf-mute: *Ormsbee v. B. & P. Rd. Corp.*, 14 R. I. 102, 108; *N. O. Rd. v. Mitchell*, 52 Miss. 808; *Laverenz v. C., R. I. & P. Rd.*, 56 Iowa 689; *Curtin v. C., R. I. & P. Rd.*, 57 Id. 316; *Benton v. Cent. Rd.*, 42 Id. 192; *P., C. & St. L. Rd. v. Yundt*, 78 Ind. 373; *S. & N. Ala. Rd. v. Thompson*, 62 Ala. 494; *Wilds v. H. R. Rd.*, 24 N. Y. 430; *Belton v. Baxter*, 54 Id. 246; *Wendell v. N. Y. C. & H. R. Rd.*, 91 Id. 420; *Connelly v. Rd.*, 88 Id. 346; *Parker v. W. & W. Rd.*, 86 N. C. 221; *P. & R. Rd. v. Boyer*, 97 Penn. St. 91; *Penn. Rd. v. Fortney*, 90 Id. 324; *R. & C. Rd. v. Ritchie*, 102 Id. 425; *Moody v. The P. Ry.*, 68 Mo. 470; *Mahlan v. Rd.*, 49 Mich. 585; *Penn. Co. v. Righter*, 42 N. J. L. 180; *Telfer v. N. Rd.*, 30 Id. 188; *M. & E. Rd. v. Haslan*, 33 Id. 147; *Murray v. Rd.*, 31 La. Ann. 490; *C. & N. W. Rd. v. Dimick*, 96 Ill. 42; *C., B. & Q. Rd. v. Damerell*, 81 Id. 450; *C. & N. W. Rd. v. Hatch*, 79 Id. 137; *Abbott v. Rd.*, 30 Minn. 482; especially, where knowing of the immediate proximity of the train: *Kelley v. Rd.*, 75 Mo. 138; *Pakalinsky v. N. Y. C. & H. R. Rd.*, 82 N. Y. 424; *Ernst v. Rd.*, 35 Id. 9; *Palys v. Erie Ry.*, 30 N. J. Eq. 604; *Parker v. W. & W. Rd.*, 86 N. C. 221; or where using a private crossing: *Johnson v. L. & N. Rd.* (Ky. 1883) 13 Am. & Eng. Rd. Cas. 623; *Cordell v. N. Y. C. & H. R. Rd.*, 75 N. Y. 330. And it is held necessarily fatal to an action, if a traveller approaches a dangerous crossing at such speed as to be unable to stop his horses before getting on the track, as he does it at his own peril of being injured by a collision with an approaching train. In doing so, he not only rashly risks his own life and property, but puts into jeopardy the lives of the passengers and employees on the approaching train: *Tucker v. Duncan*, 4 Woods 652; *Wilds v. H. R. Rd.*, 24 N. Y. 430; *Grippen v. N. Y. C. Rd.*, 40 Id. 34; *Haring v. N. Y. & Erie Ry.*, 13 Barb. 9; *Glendening v. Sharp*, 22 Hun 78; *Salter v. U. P. Rd.*, 13 Id. 187; *Mantel v. C., M. & St. P. Rd.*, 33 Minn. 62; *U. P. Ry. v. Adams*, 33 Kan. 427; *Fletcher v. A. & P. Rd.*, 64 Mo. 484; *Benton v. Central Ry.*, 42 Iowa 193; *L. S. & U. S. Rd. v. Miller*, 25 Mich. 274; *Grows v. M. C. Ry.*, 67 Me. 100; *W., St. L. & P. Ry. v. Hicks*, 13 Ill. App. 407; especially, where driving a horse at the rate of a mile in four

minutes : *Fleming v. W. P. Ry.*, 49 Cal. 253. Even where a traveller, driving at a brisk trot, trusted to the statutory signals to warn him of an approaching train : *Turner v. H. & St. J. Rd.*, 74 Mo. 603. But in a late case, *Tyler v. N. Y. & N. E. Rd.*, 137 Mass. 238, in which it was claimed that the plaintiff had no right to go so near the track that he could not stop before reaching it, until he had assured himself there was no danger, the court (W. ALLEN, J.), said : "The true proposition is, that the plaintiff was bound to use reasonable care to avoid getting into a position in which he could not escape a collision. The fact that he did not find himself in such a position is not conclusive evidence that he was there by his own negligence. * * * Whether he used due care to know if a train was coming, and to be in a condition to avoid it, were questions which depended upon inferences of fact to be found by the jury." The employees of the company may act upon the presumption that a traveller seen approaching a railroad crossing will not heedlessly expose himself to known peril by attempting to cross in front of the train : *M. C. Rd. v. Neubeur*, 62 Md. 391; *Parker v. Rd.*, 86 N. C. 221; *Telfer v. N. Ry.*, 30 N. J. L. 188.

The rule that a person who voluntarily and without necessity exposes himself to a known danger, although the danger be increased by the act of such person in the face of impending peril, cannot recover, is also applied to trespassers upon the tracks of railroads. A person enters upon such tracks at his peril; the company having an exclusive right of way, and being under no obligations to intruders upon it. The company has a right to presume that no one without right will be upon its track, and also to presume that if any person is seen upon the same that he will leave it at the last moment, at least, and this until possibly too late to avoid collision. If, however, the injury, even to a wrongdoer, be inflicted wilfully or wantonly, or by gross carelessness under the circumstances of the case, then, although negligent, the plaintiff may recover : *Mason v. Rd.*, 27 Kans. 83; *Logan v. Rd.*, 77 Mo. 663; *Mulherrin v. Rd.*, 81 Penn. St. 366; *Pennsylvania Rd. v. Hummell*, 44 Id. 379; *State v. B. & P. Rd.*, 58 Md. 221, 482; *Pennsylvania Rd. v. Sinclair*, 62 Ind. 309; *McCarty v. Del. & H. Canal Co.*, 17 Hun 74; *Rounds v. Del. L. & W. Ry.*, 64 N. Y. 129; *Johnson v. Rd.*, 125 Mass. 75; *Lovett v. Rd.*, 9 Allen 557; *Murphy v. Rd.*, 38 Iowa 539; *Colorado Central Rd. v. Holmes*, 5 Col. 197; *South Western Rd. v. Harkerson*, 61 Ga. 114; *Ill. Cent. Rd. v. Hetherington*, 83 Ill. 510;

Carter v. Rd., 19 S. C. 20; *H. & T. C. Rd. v. Smith*, 52 Tex. 178; *B. & O. Rd. v. Sherman*, 30 Gratt. 602; *Herring v. Rd.*, 10 Ired. L. 402; *Manly v. Rd.*, 74 N. C. 655; *McClelland v. Rd.*, 94 Ind. 276. Especially where walking on trestle-bridges: *Mason v. Rd.*, 27 Kans. 83; *Tennenbrock v. Rd.*, 59 Cal. 269; *Rd. v. Greene*, 19 Am. & Eng. Rd. Cas. 95 (Ky., 1884). Even where upon the track at the sufferance or with the permission of the company, they are subject to all the risks incident to so hazardous an undertaking: *J. M. & I. Rd. v. Goldsmith*, 47 Ind. 43; *McLaren v. Rd.*, 8 Am. & Eng. Rd. Cas. 217; *Hogan v. Rd.*, 59 Wis. 139; *Fitzpatrick v. Fitchburg Rd.*, 128 Mass. 13; *Austin v. Rd.*, 91 Ill. 35; *O'Donnell v. Rd.*, 7 Mo. App. 190.

And the presumption applies to deaf mutes, unless their misfortune be known to the employees of the train: *Zimmerman v. Rd.*, 71 Mo. 476; *Cogswell v. Rd.*, 6 Or. 417; *Rd. v. McLaren*, 62 Ind. 566; *Laicher v. Rd.*, 28 La. Ann. 320; *L. & N. Rd. v. Cooper*, 6 Am. & Eng. Rd. Cas. 5 (Ky. 1882); *Purl v. Rd.*, 79 Mo. 168; or to insensible or drunken men: *Ill. Cent. Rd. v. Hutchinson*, 47 Ill. 408; *South Western Ry. v. Johnson*, 60 Ga. 667; *Dinwiddie v. Rd.*, 9 Lea 309; *Yarnall v. Rd.*, 75 Mo. 575; *Rd. v. Sympkins*, 54 Tex. 614.

The limitation of the rule stated also applies where a person voluntarily, and without necessity, jumps from or upon a railroad train while in motion. The general rule is, in such cases, that one who is guilty of such disregard of life and personal safety will, by his own rashness, defeat a recovery, although he may honestly believe that he will not be injured in so doing, it being, nevertheless, negligence to take such risk: *McCorkle v. Rd.*, 61 Iowa 555; *N. & C. Rd. v. Smith*, 9 Lea 470; *Cent. Rd. v. Letcher*, 69 Ala. 106; *Secor v. Rd.*, 10 Fed. Rep. 15; *Dougherty v. C.*; *B. & Q. Rd.*, 86 Ill. 467; *O. & M. Rd. v. Stratton*, 78 Id. 88; *L. & M. S. Rd. v. Bangs*, 47 Mich. 470; *Rd. v. Hendricks*, 26 Ind. 228; *Knight v. Pontchartrain Ry.*, 23 La. Ann. 462; *Hubener v. Rd.*, 23 Id. 492; *Harvey v. Eastern Ry.*, 116 Mass. 269; *Hickey v. Rd.*, 14 Allen 429; *Rd. v. Schaufler*, 75 Ala. 136; *I. & G. N. Rd. v. Hassell*, 62 Tex. 256; *C. W. & M. Rd. v. Peters*, 80 Ind. 168; *Rd. v. Krouse*, 30 Ohio St. 222; *St. L., I. M. & S. Rd. v. Cantrell*, 37 Ark. 519; *C. & A. Rd. v. Randolph*, 53 Ill. 510; *Jeffersonville Rd. v. Swift*, 26 Ind. 459; *Lambeth v. N. C. Rd.*, 66 N. C. 494; *Kline v. C. P. Rd.*, 37 Cal. 400; *Doss v. M., K. & T. Ry.*, 59 Mo. 27; *Swigert*

v. *H. & St. J. Rd.*, 75 Id. 425; *Morrison v. Erie Ry.*, 56 N. Y. 302; *G., H. & S. A. Rd. v. Smith*, 59 Tex. 406; especially where a passenger steps off a moving train contrary to the warning of train employees: *Jewell v. Rd.*, 54 Wis. 610. Nor will a passenger be justified in exposing himself to such peril upon the command, direction or advice of a conductor or other official on the train, be it ever so plain and unambiguous. In such a case the passenger should, instead of complying, disobey such command or disregard such advice, for otherwise his rashness in exposing himself to visible danger will defeat recovery in any case: *Southwestern Ry. v. Singleton*, 66 Ga. 252; s. c. 67 Id. 306; *St. L., I. R. & S. Rd. v. Cantrell*, 37 Ark. 519; *Rd. v. Krouse*, 30 Ohio St. 222; *C. B. & Q. Rd. v. Hazzard*, 26 Ill. 373; *J. & C. Rd. v. Hendricks*, 26 Ind. 228.

WILLIAM COLEBROOKE.

RECENT AMERICAN DECISIONS.

Supreme Court of Pennsylvania.

BENTLEY v. LAMB.

The duty to perform a positive promise which is not contrary to law or to public policy, or obtained by fraud, imposition, undue influence, or mistake, is an obligation in morals, and being so, it is a sufficient consideration for an express promise.

A. gave to B., who had been employed by him for a number of years as sales-lady, a due-bill for \$3000, payable within one year after his death. This due-bill was given in pursuance of an agreement wherein he agreed to give her the same, and stated that it was for additional compensation for services rendered. A. died, and his executors, on suit being brought on the due-bill, set up want of consideration. *Held*, that the services rendered, although partly paid for, were sufficient consideration for the due-bill.

ERROR to Common Pleas No. 1, Philadelphia county.

Assumpsit by Julia W. Lamb against William K. Bentley and Elizabeth Green, executors of John B. Green, deceased, upon a due-bill for \$3000, given by decedent to plaintiff. The action was upon the following due-bill:

“Philadelphia, April 5th 1883.

“Due Miss Julia W. Lamb, three thousand dollars, additional compensation as sales-lady in my store, No. 728 Spring Garden street, payable one year after my decease, by my executors or administrators to be paid out of my estate. If Miss Julia W. Lamb dies before it becomes due, the money will revert back to the estate.

[Signed] JOHN B. GREEN, 728 Spring Garden Street.”

This was given in pursuance of an agreement of like date, which read thus :

“Philadelphia, April 5th 1883.

“Whereas, Miss Julia W. Lamb has been in my employ for about twenty-three years as sales-lady, and having been faithful in the discharge of her duty, and wishing to give her additional compensation for the services rendered, I hereby agree to give her a due-bill of three thousand dollars, payable by my executors within one year from the time of my decease, to be paid out of my estate.

[Signed] JOHN B. GREEN, 728 Spring Garden Street.”

John B. Green died June 14th 1883, leaving a will dated June 1st 1883, which revoked all prior wills. The testator's daughter swore that on the Tuesday following her father's decease she paid the plaintiff “her week's wages, six dollars. I knew that six dollars was her week's wages, as I have frequently paid her before. She did not claim anything more being due her. She said that it was all right.” The court instructed the jury to find a verdict for the plaintiff. Verdict and judgment accordingly for plaintiff, whereupon defendants took this writ.

John G. Johnson, for plaintiffs in error.

James S. Williams and *M. Hampton Todd*, for defendant in error.

The opinion of the court was delivered by

GREEN, J.—We do not see how we can say as matter of law that there was no evidence of a consideration for the obligation in suit. There was no testimony as to what the actual agreement of the parties was in regard to the compensation to be paid to the plaintiff for her services. There was inferential evidence that it was six dollars per week, because that amount was paid to and accepted by her for one week's service after the testator's death. But this is not necessarily inconsistent with a possible promise that she should be paid a larger sum. It is, of course, consistent with the theory that the sum thus paid was the stipulated compensation, and therefore it would be evidence, though not conclusive, in an action for the services. But here the action is upon an express positive promise, in writing, signed by the decedent, to pay a fixed sum. The only defence is want of consideration. What is the state of the proof upon this subject? A previous writing, also.

signed by the decedent, is in evidence, in which he recites that the plaintiff had been in his employment for twenty-three years as sales-lady; that she had been faithful in the discharge of her duty; and that he wished to give her additional compensation for her services; and in consideration of these facts he agrees that he will give her a due-bill for \$3000, to be paid by his executors within one year after his death. The decedent lived upwards of two months after this paper was executed, and the plaintiff continued to render him service to the time of his death. The writing not only recognises, but declares, that the due-bill shall be given as *compensation* for services rendered—additional compensation, it is true, but compensation nevertheless. To what it was additional we do not know. Whether it was additional to full or only partial compensation previously paid, is only a matter of conjecture. There is no inference of law that the previous compensation was in full, and the inference of fact would rather be that it was partial only, simply because the decedent himself so treats and declares it. Such a declaration is certainly some evidence that there was an obligation which the decedent regarded as binding upon him; and in consideration of his own sense of duty in the circumstances, no matter how it arose, he contracted with the plaintiff that he would give her a due-bill for the amount stated. In execution of this contract he did give her the due-bill in question upon which this suit is founded. If it be granted that the agreement to give the due-bill imposed no legal obligation, how can it be denied that it created at least a moral obligation to do so? The duty to perform a positive promise which is not contrary to law or to public policy, or obtained by fraud, imposition, undue influence, or mistake, is certainly an obligation in morals, and, if so, it is a sufficient consideration for an express promise. But in the due-bill the recital of the consideration of actual services rendered is repeated, and it is some proof that the services had been rendered, and had not been fully compensated. The decedent himself so admits and asserts, and it would be an unjust assumption in the law to infer the contrary in the face of such testimony. These features in the present case constitute a wide difference between it and the cases cited for the plaintiff in error, in which it was either proved or properly assumed that the past consideration was entirely executed. Here there is, in the first place, a written agreement to give the due-bill, and the actual execution and delivery of the due-bill in performance of that agree-

ment. There is, in addition, the undisputed declaration of the promise, that both the agreement and due-bill were given as compensation for long and faithful services actually rendered by the plaintiff, and no distinct proof that those services had been fully paid for. In such circumstances we cannot say there was no evidence of any obligation, legal or moral, to give the due-bill in question; and, such being the case, there being nothing else to impeach the right of recovery, the court below was right in directing a verdict for the plaintiff.

Judgment affirmed.

We have read this case with more than usual interest, on account of the important question involved, and because it has seemed to us that the rule therein laid down respecting the sufficiency of a mere moral obligation to support an express promise can hardly be regarded as the rule of the common law. If there is any one well-settled rule of the common law, it is that a valuable consideration is necessary to support a simple contract; and we have always understood a merely moral obligation not to be a valuable consideration. With reference to this question, Mr. Baron PARKER said: "A mere moral consideration is nothing:" *Jennings v. Brown*, 9 M. & W. 501. See the cases collected in 1 Pars. Cont. *432 -4. With reference to this subject Mr. Parsons says: "The rule may now be stated as follows: A moral obligation to pay money or to perform a duty is a good consideration for a promise to do so, where there was originally an obligation to pay the money or to do the duty, which was enforceable at law but for the interference of some rule of law:" 1 Pars. Cont. *434; note to *Wennall v. Adney*, 3 B. & P. 249.

It is true that the case of *Lee v. Mugeridge*, 5 Taunt. 36, lays down the rule that a moral obligation is a good consideration for a subsequent promise to pay, and applies the doctrine to the promise of a woman made after the death of her husband to pay a bond made by her during coverture for the repayment by her

executors, of money advanced to her son-in-law, at her request, on the security of said bond. This case is supported by a number of cases and dicta: *Atkins v. Banwell*, 2 East 506; *Hawkes v. Saunders*, 1 Cowp. 294; *Gibbs v. Merrill*, 3 Taunt. 311; *Seaman v. Price*, 2 Bing. 439; *Bentley v. Morse*, 14 Johns. 468; *Glass v. Beach*, 5 Vt. 176; *Barlow v. Smith*, 4 Id. 144; *Turner v. Patridge*, 3 P. & W. 172; *Commissioners v. Perry*, 5 Ohio 58; *Fairchild v. Bell*, 1 Rice (S. C.) Dig. 60; *Stewart v. Eden*, 2 Caines 150; *Wilson v. Burr*, 25 Wend. 386. See, also, *Goulding v. Davidson*, 26 N. Y. 604.

The case of *Lee v. Mugeridge*, is, however, believed to be opposed to the weight of common-law authority. Besides the authorities already cited, see *Littlefield v. Shee*, 2 B. & Ad. 813; *Monkman v. Shepherdson*, 11 A. & E. 415; *Beaumont v. Reeve*, 8 Q. B. 486; *Eastwood v. Kenyon*, 11 A. & E. 447; *Kaye v. Dutton*, 7 M. & G. 807; *Cook v. Bradley*, 7 Conn. 57; *Mills v. Wyman*, 3 Pick. 207; *Edwards v. Davis*, 16 Johns. 283. note; *Smith v. Ware*, 13 Id. 259; *McPherson v. Rees*, 2 P. & W. 521; *Freeman v. Robinson*, 9 Vroom 383; *Dodge v. Adams*, 19 Pick. 429; *Loomis v. Newhall*, 15 Id. 159; *Parker v. Carter*, 4 Munf. 273; *Hawley v. Farrar*, 1 Vt. 420; *Farnham v. O'Brien*, 22 Me. 475; *Warren v. Whitney*, 24 Id. 561; *Sneely v. Read*, 9 Watts 396; *Ehle v. Judson*, 24 Wend. 97; *Geer v. Archer*,

2 Barb. 420; *Shepard v. Rhodes*, 7 R. I. 472; *Bates v. Watson*, 1 Sneed 376; *Nash v. Russell*, 5 Barb. 556; *Watkins v. Halstead*, 2 Sandf. 311; *Allen v. Bryson* (S. Ct. Iowa), 25 N. W. Rep. 820; Yelv. 41 b; Metc. Contr. 178; 1 Chit. Contr. (11th Am. ed.) 52; 2 Bl. Com. (Cooley's ed.) 445, note; 1 Pars. Cont. *434.

Possibly upon the facts of the principal case the court was warranted in saying that it could not say as matter of law that there was no evidence of a consideration. But upon the other hand there was, as it seems to us, evidence tending to show that the due-bill was a mere gratuity, and it seems to us that the question was properly one of fact for the jury. The

equities of the case were clearly with the plaintiff, and one cannot regret that the decision was in her favor. But the court have, as it seems to us, in laying down the rule that the duty to perform a positive promise which is not contrary to law or to public policy, or obtained by fraud, imposition, undue influence or mistake, is an obligation in morals, and, if so, sufficient consideration for an express promise, gone farther than the English or American authorities will support them; or to state our opinion more clearly, it seems to us that this doctrine can find no valid support in the common law.

M. D. EWELL.

Chicago.

Supreme Court of Oregon.

WHITE v. COUNTY JUDGE.

Where a state constitution provides that every white male citizen, who shall have resided in the state for a certain period preceding the election, shall have the right to vote, any registry law which requires previous registry of the citizen as a prerequisite to the right to vote is unconstitutional and void.

Such a law is not a rule of procedure, but a legislative condition attempted to be attached to the exercise of a constitutional right.

THIS suit was brought to determine the constitutionality of the late act providing for the registration of voters. The constitution of Oregon, art. 2, sect. 2, provides: "In all elections not otherwise provided for by this constitution, every white male citizen of the United States of the age of twenty-one years and upwards who shall have resided in the state during the six months immediately preceding such election, and every white male of foreign birth of the age of twenty-one years and upwards who shall have resided in this state during the six months immediately preceding such election, and shall have declared his intention to become a citizen of the United States one year preceding such election, conformably to the laws of the United States on the subject of naturalization, shall be entitled to vote at all elections authorized by law."

G. A. McBride, W. D. Fenton and John Burnett, for appellant.
Joseph Simon and John M. Gearin, contra.

The opinion of the court was delivered by

WALDO, C. J.—The district-attorney for the fifth judicial district, as a sample of the workings of the law, explained how he could be deprived of his vote by the mere fact of necessary absence from Clackamas county during the period of registration in attending to his official duties in other counties in his district. We find it unnecessary, however, to enter into an examination of the details of the act, for it is met at the threshold by a fatal objection. As we construe the constitution, every law which requires previous registry as a prerequisite to the right to vote is, *ipso facto*, void. The legislature would have the power by implication, had it not been expressly conferred, to prescribe the manner of regulating and conducting the elections; but the right to vote itself has been placed beyond their interference or control. This fact seems to have been forgotten in framing the act. And how different, apparently, was the framers' conception of the important nature of the right from that of Lord HOLT, nearly two hundred years ago, a judge who was never accused of being recreant to the liberties of Englishmen, "that a right which a man has to give his vote at the election of a person to represent him in parliament, there to concur to the making of laws, which are to him his liberty and property, is a most transcendent thing and of a high nature:" *Ashby v. White*, 2 Ld. Raym. 953. If the attention were not permitted to wander beyond the act itself, the thought would hardly occur that the legislature was dealing with a right vested in the citizen by the constitution—a right of which "no department of the government, nor all of them combined," said the court in *State v. Adams*, 2 Stew. 239, "have the power to divest an individual otherwise than is prescribed by the constitution." So in *Brown v. Hummel*, 6 Penn. St. 86, COULTER, J., said: "The most important of all our franchises, the right of an elector and citizen, cannot, in a confined sense, be called property. It is not assets to pay debts, nor does it descend to the heir or administrator. But who does not feel its value, and who but would turn pale if he thought he could be deprived of it, without hearing or trial, by Act of Assembly?" Important, however, as the question may be, we approach its consideration without solicitude, other than an anxiety to understand and declare the law of the land. That inveterate argument, the gravity of declaring an act of the legislature unconstitutional, was urged as usual in such cases. If, however, a law be unconstitu-

tional, the gravity of not declaring it to be so is also worthy of consideration. Our constitutions are "written securities of liberty," as Chief Justice RUFFIN has expressed it. That sound and able judge, Mr. Justice CAMPBELL, of Michigan, well said, in *Sears v. Cottrell*, 5 Mich. 283, that "every unconstitutional law which is made to stand creates a permanent and deadly evil by overturning the only safeguards we have against public usurpation." The judiciary, as the guardians of the people's constitutional liberties, must in duty observe that vigilance against constitutional encroachment, which is said to be the price of liberty. The rules of law are beyond the control of those who are merely to declare what the law is. In every case, the gravity consists in ascertaining what the law is. A text of the famous Littleton has come down to us in the year books (Year Book, 6th ed. 4, 8, pl. 18): *Le ley est tout un en greind et meind*—the law is all one in great things and small. The right to vote, under the Constitution, is a vested and constitutional right. "When I say a right is vested, I mean that he has the power to do certain actions, or to possess certain things, according to the law of the land." CHASE, J., in *Calder v. Bull*, 3 Dall. 394. If the right be vested by the constitution, it denotes a right that cannot, under the constitution, be taken away: *Rich v. Flanders*, 39 N. H. 385; *Eakin v. Raub*, 12 S. & R. 360. It would seem that every case, from *Capen v. Foster*, 12 Pick. 485, down, which has sustained against similar objections the constitutionality of a registry law which requires previous registry as a prerequisite to the right to vote, has taken it for granted that such laws were mere rules of procedure. It was assumed in *Capen v. Foster*, *supra*, that the right to make investigations into the qualifications of voters necessarily implies the right to compel the voter to furnish previous proof of his qualifications; that such a law was but "a reasonable and convenient regulation of the mode of exercising the right of voting." It was placed on the same footing with a law which required the voter to offer his vote in writing. Now, voting *viva voce*, or by ballot, is a pure rule of procedure. So are laws regulating polling places, and the time for opening and closing the polls. He who takes a check to a bank to cash it must endorse it. He who pays money is entitled to a receipt. This is procedure. But if a contract be to pay money on a fixed day, a subsequent law requiring the payee to give ten days' notice of the time and place of payment, or no obligation to pay shall arise, affects the substance of

the contract, and is void. It is conceived that laws are of like nature which require previous registry in order to vote. Where the right is secured by the constitution, such laws, having merely a legislative sanction, are void. The true view of this question seems to be that stated in *State v. Baker*, 38 Wis. 86, that where registry is required as a prerequisite to the right to vote, such registry is a condition precedent to the right itself, and therefore a rule of substantive law. This principle was subsequently practically applied in *Dells v. Kennedy*, 49 Wis. 555, in which a registry law of Wisconsin was held to be void. It results as follows: A right has been defined by Mr. Justice HOLMES to be the legal consequence which attaches to certain facts: The Common Law 214. Every fact which forms one of the group of facts, of which the right is the legal consequence, appertains to the substance of the right.

The right to vote under the constitution may be defined to be a vested right *in presenti*, to be exercised *in futuro* on a fixed day. When that day arrives and the right is to be exercised, every fact essential to the existence of the right is a substantive fact. Previous registry in order to vote is precisely such a fact. It is a condition precedent which must be performed, or when the day arrives no right will exist. Procedure *ex vi termini* appertains to the mode of enjoyment or enforcement of a right. No rule of procedure can operate anterior to the time when the right is to be enjoyed or enforced. It cannot have effect to determine a right before the right accrues. The distinction, therefore, sought to be drawn on this subject between what constitutes a qualification and what in contradistinction is called a mode of proof of qualification, is unsubstantial. We may say of the attempted distinction in words of a chief justice in England centuries ago: "Therefore, we must take off this veil and cover of words which make a show of something and in truth are nothing." "Every definition of the qualification of voters," said Mr. Drake, the author of the Law of Attachment, arguing in *Blair v. Ridgely*, 41 Mo. 163, "is but a statement of the terms on which men may vote; and in every instance, such definitions refer to what a party has done as well as to what he is. They say to the voter: 'If you have done certain things you can vote.' " He who does not register is not qualified to vote, and hence is not a qualified elector—a phrase that is used five times in the constitution to signify those who are entitled to go to the polls on election day and legally vote. See *Byrne v. State*, 12 Wis. 524 ;

Sanford v. Prentice, 28 Id. 363. But under this act, he who goes to the polls on election day, possessing every constitutional qualification, may find that the legislature has stepped in between him and the constitution. He finds his vote denied because he has not done something which the legislature has required him to do. He discovers that he is not a qualified elector, and yet he is told that his omission to do the act which had effect to disqualify him is not itself a disqualification. Or if he had performed the act, that his performance does not constitute a qualification. This will not square with the logic of facts. The distinction is between what is substantive and what is modal. He who has a right to do something to-morrow can never be secure of his right before to-morrow comes. If this can result, then the constitution does not mean what it says. *McCaffarty v. Guyer*, 59 Penn. St. 111, very aptly says: "Can the legislature then take away from an elector his right to vote while he possesses all the qualifications required by the constitution? This is the question now before us. When the citizen goes to the polls on election day with the constitution in his hand and presents it as giving him a right to vote, can he be told, 'true, you have every qualification that instrument requires; it declares you entitled to the right of an elector, but an Act of Assembly forbids your vote, and therefore it cannot be received.' If so, the legislature is superior to the organic law of the state; and the legislature, instead of being controlled by it, may mould the constitution at their pleasure. Such is not the law." And so must we say in this case. Where a constitution provides, as does that of New York, "that laws shall be made for ascertaining by proper proofs the citizens who shall be entitled to the right of suffrage," the power to pass a registry law seems fully implied. See *U. S. v. Quinn*, 8 Blatchf. 59. The case of *State v. Butts*, 31 Kans. 554, was grounded on a like constitutional clause. The difference between those cases and the present is the difference between a case where a power has been conferred and a case where it has not. So, on the other hand, a question can never arise under a constitution like that of Texas, which has declared in unequivocal terms, that "no law shall ever be enacted requiring a registration of the voters of this state." See *U. S. v. Slater*, 4 Woods 358. The right of the plaintiff to maintain this suit is set at rest by the decision of this court in *Carman v. Woodruff*, 10 Oregon 133. The opinion cites, with many other

cases, *Page v. Allen*, 58 Penn. St. 338, which presented this very case.

Injunction granted.

THAYER, J., dissented.

"In all cases where the constitution has conferred a political right or privilege, and where the constitution has not particularly designated the manner in which that right is to be exercised, it is clearly within the just and constitutional limits of the legislative power to adopt any reasonable and uniform regulations in regard to the time and mode of exercising that right, which are designed to secure and facilitate the exercise of such right in a prompt and convenient manner. Such a construction would afford no warrant for such an exercise of legislative power, as under the pretence and color of regulating should subvert or injuriously restrain the right itself. * * *

"The constitution, by carefully prescribing the qualifications of voters, necessarily requires that an examination of the claim of persons to vote on the ground of possessing these qualifications must at some time be had by those who are to decide on them. * * *

"If then the constitution has made no provision in regard to the time, place and manner in which such examination shall be had, and yet such examination is necessarily incident to the actual enjoyment and exercise of the right of voting, it constitutes one of those subjects, respecting the mode of exercising the right, in relation to which it is competent to the legislature to make suitable and reasonable regulation not calculated to defeat or impair the right of voting, but rather to facilitate and secure the exercise of that right." SHAW, C. J., in *Capen v. Foster*, 12 Pick. 485; s. c. 23 Am. Dec. 632; *State v. Lean*, 9 Wis. 279.

The necessity for some provision to ascertain who are qualified voters, and the propriety of a registry law of some nature for this purpose, seem to have been

recognised in *all* the reported cases, unless the principal case is to be regarded as an exception.

"The object of all registry laws," says TAYLOR, J., "is to ascertain, before the election day, who are the qualified electors in each election district, and to do away with the necessity, as far as possible, of investigating as to the qualifications of electors on the day of election, and to prevent fraudulent voting by giving publicity beforehand to the names of all persons who claim the right to vote at the coming election. * * *

"Experience has demonstrated that registry laws are necessary to insure a fair and honest vote in all large cities, and such laws have been enacted and enforced in such cities in very many of the states of the Union for many years. In order to preserve even a pretence of purity in elections in the large centres of population, it is necessary that evidence of this right of the electors to vote should be produced before the day of election in order to enable the real electors to vote on that day; and it would be highly inconvenient, if not impossible, to make the necessary investigations on that day. Registration is in fact nothing more than a method of taking evidence beforehand of the right of the elector to vote on the day of election:" *Dells v. Kennedy*, 49 Wis. 555; s. c. 35 Am. Rep. 786; *People v. Hoffman*, 5 N. E. Rep. 596.

It is generally conceded that a registry law which attempts to add to the prescribed constitutional qualifications for electors, by increasing the required time of residence or limiting the prescribed district wherein the elector may vote, or providing for payment of a special tax as a prerequisite, or which makes race or class distinctions, is unconstitutional and void: *Page v. Allen*, 58 Penn.

St. 338; *State v. Williams*, 5 Wis. 308; *Monroe v. Collins*, 17 Ohio St. 665; *U. S. v. Slater*, 4 Woods 358; but see *Davis v. School District*, 44 N. H. 398.

About the constitutionality of registry laws which require the elector who has not registered before the day of election to make oath to his qualifications, of the reasons for his failure to register and to supplement such evidence by that of duly registered election, there can be no reasonable doubt: *State v. Hilmantel*, 21 Wis. 566; *Edmonds v. Banbury*, 28 Ia. 267; s. c. 4 Am. Rep. 177; *State v. Baker*, 38 Wis. 71; *In re Election of McDonough*, 105 Penn. St. 490; *Hyde v. Brush*, 34 Conn. 454.

"There can be no question that the legislature may provide all reasonable safeguards to preserve the ballot box from fraud, and to maintain the purity of our elections, and as the wisdom of our laws, the fair and impartial administration of justice, depend upon the officers chosen by the people and even the perpetuity of our present form of government can only be maintained by preserving our elections free from fraud and corruption, all reasonable requirements, for the purpose not calculated to abridge the elective franchise, are within the scope of legislative power. That the affidavit of the elector and the oath of the householder is a reasonable requirement would seem to be clear in all cases when the elector's name does not appear upon the registry. It in no wise abridges his right to vote if entitled to the privilege:" *Byler v. Asher*, 47 Ill. 101.

Whether a law is valid which makes registration before the day of election absolutely necessary to vote, and provides no way for the elector to prove his qualifications at the polls, is a much vexed question. The courts of Wisconsin, Ohio and Oregon, *supra*, have declared such laws void.

In *Daggett v. Hudson*, 3 N. E. Rep. (Ohio) 538, it is said: "The necessary absence of a voter on the seven days pro-

vided by statute for registration, either by sickness, business, imprisonment or other lawful reason, absolutely forfeits for the time being his constitutional right of suffrage. He cannot anticipate expected absence and register at an earlier period. He cannot prove his right by the affidavit of others, and excuse his personal appearance at the place of registration. He cannot, on the day of election or within five days prior thereto, by any proof of constitutional qualification, supply the want of former registration. A foreigner who has taken out his first papers and made his necessary declaration to become a citizen, and whose right to full citizenship and the elective franchise will ripen during the five days before or on the day of election, cannot secure registration or the right to vote because he cannot prove in advance that the action of the court will naturalize him."

In *Dells v. Kennedy*, 49 Wis. 555, the court use much the same argument and add: "That vice is that the law disfranchises a constitutionally qualified elector without his default or negligence, and makes no exception in his favor, and provides no method, chance or opportunity for him to make proof of his qualifications on the day of election, the only time perhaps when he could possibly do so."

On the other hand the courts of New York, Massachusetts, Illinois, Michigan and Kansas, have decided in favor of the constitutionality of laws requiring previous registration as an absolute prerequisite to voting.

In *People v. Hoffman*, 5 N. E. Rep. 596 (Ill.), the court says: "What evidence shall be required to establish a voter's qualifications and how that evidence shall be presented to a body acting upon it as a matter of discretion with the legislature. * * * If cases can be supposed where the three weeks' requirement will deprive qualified electors of the privilege of depositing their votes, cases can also be supposed where one

day's requirement will work the same result. This mode of reasoning, carried out to its logical sequence, will make any kind of registry law unconstitutional; for it would be a physical impossibility for the judges of the election to receive the votes and make up the register at the same time and on the same day. If the legislature has the power to direct the registry to be completed before election day, and if in its wisdom and under a sense of its responsibility to the people, it has said that three weeks before election is a reasonable date for the completion of the registry, shall this court substitute its judgment for that of the law-making power, and say a shorter time would have been more reasonable? * * * If closing the registry lists three weeks before election may deprive a few persons becoming qualified during that period of the privilege of casting their ballots, keeping it open to a later day, may admit to the polls hundreds of persons who should never have been allowed to vote."

So in *State v. Butts*, 31 Kans. 537, BREWER, J., said: "It is true isolated instances may occur where a party through absence or sickness is unable to register and so loses his vote, but the same result may follow where any failure to produce the required evidence occurs. It is a mistake to suppose that there is any special virtue in the mere day of election. If the legislature has the right to require proof of a man's qualification, it has a right to say when such proof shall be furnished and before what tribunal; and unless this power is abused the courts may not interfere." It may be remarked that the constitutional provisions referred to in the principal case gives no authority to the legislatures of New York and Kansas to add to the qualifications of electors, but simply to determine who are qualified, a power necessarily implied where not expressed: *U. S. v. Quinn*, 8 Blatchf. 48. See, also, *Capen v. Foster*, 12 Pick. 485; *People v. Kopplekom*, 16 Mich. 342; *People v. Wilson*, 62 N. Y.

186; *Ensforth v. Albin*, 46 Mo. 450; *Keenan v. Cook*, 12 R. I. 52; *People v. Laine*, 33 Cal. 55; *Webster v. Byrnes*, 34 Id. 273; *C. & N. N. G. Rd. v. Commissioners*, 72 N. C. 486; *Cooley Const. Lim.* 757; *McCrary on Elections* 47.

We cannot but regard the latter doctrine as supported by the great weight of authority, and a system of registration requiring proof of the elector's qualifications before election day, as a reasonable regulation, since in many cities it is a necessity if the spirit of a constitution designed to protect free and equal elections, is to be observed.

A registry law is not unconstitutional, which may operate to require greater proofs of the elector's qualifications in one locality than in another: *Patterson v. Barlow*, 60 Penn. St. 54; *State v. Butts*, 31 Kans. 537; *People v. Hoffman*, 5 N. E. Rep. 596.

For discussion of registry laws, touching upon the political opinions of election officers, see *People v. Hoffman*, *supra*; *Atty-Gen. v. Detroit*, 24 N. W. Rep. 887.

Where a registry law requires registration as a prerequisite to voting, a failure to make such registry will make the election void: *Perry v. Whitaker*, 71 N. C. 475; *People v. Kopplekom*, 16 Mich. 342; *Zeiler v. Chapman*, 54 Mo. 502; *Nefzger v. D. & St. P. Rd.*, 36 Ia. 642; *State v. Stumpf*, 23 Wis. 630; *People v. Laine*, 33 Cal. 55. But mere irregularities in the registry will not invalidate the election: *Atty-Gen. v. Ely*, 4 Wis. 420; *State v. Elwood*, 12 Id. 551; *State v. Baker*, 38 Id. 71; *Barnes v. Supervisors*, 51 Miss. 305; *Newsom v. Earnhart*, 86 N. C. 391; *People v. Wilson*, 62 N. Y. 186; *Brightly Lead. Elect. Cas.* 448 n.

As to the legality of a vote cast by a qualified but unregistered voter, see *Dale v. Irwin*, 78 Ill. 170; *Clark v. Robinson*, 88 Id. 498; *Kuykendall v. Harker*, 89 Id. 126; *State v. Hilmantel*, 21 Wis. 566.

CHARLES A. ROBBINS.

Lincoln, Neb.

Supreme Court of Montana.

NORTHERN PACIFIC RAILROAD CO. v. SHIMMEL.

Where an office safe, kept at a railroad depot and used by the agent as a place of deposit for his daily receipts and valuable papers, is useful, and facilitates the successful operation of the road, it is not subject to levy under an execution on a judgment against the road.

APPEAL from First District, Custer county.

Saunders, Cullen & Saunders, for appellant, Northern Pacific Railroad Company.

WADE, C. J.—The only questions presented by this appeal are the following, viz.: 1. Does the evidence support the verdict and justify it? 2. Can the property of the Northern Pacific Railroad Company, in the territory of Montana, necessary, convenient and usual for running and operating said road, be lawfully seized and sold on execution to satisfy a judgment against said company? The property in question is a certain office safe, known as a "Diebold Combination Safe," which was seized on an execution issued out of the Probate Court of Yellowstone county, and taken from the plaintiff's depot and station at the town of Billings, in said county, and sold at auction, whereby the defendant claims title and right of possession. There was a verdict and judgment for defendant, and the plaintiff appeals.

As to the question whether the safe in controversy was a part of the usual, necessary and convenient equipment of the Northern Pacific Railroad Company, to enable it to operate its road at the time it was seized on execution, the testimony showed that the safe was in use by the plaintiff in and about its business as a railroad company in the depot at Billings, and was the only safe there; that it was in daily use by the company in its railroad business thereat, in keeping therein the moneys received by the company, which amounted to from two hundred to five thousand dollars per day, and in the preservation of its books of account of said railroad business at said station; that since the safe had been taken away, the agent at Billings, in consequence of its seizure, had been compelled to use safes of other parties by their consent, or else carry said moneys on his person; and in the opinion of said agent, said safe was, under the circumstances, a necessary part of the equipment and furniture of the plaintiff at said depot. It also appeared in evidence that there was a bank in said town, with a vault, wherein plaintiff was permitted

to deposit its moneys, books and papers, and that the plaintiff had procured no other safe since the one in question was seized. The foregoing was all the testimony at the trial concerning the questions proposed.

Upon this state of facts, the court instructed the jury as follows : " If it has been proven to your satisfaction, by a preponderance of evidence, that this safe was an office safe—was in use at the depot at this station ; that it was a usual and necessary part of the furniture in such office, in the preservation and safe-keeping of the moneys, books of account and valuable papers used in the transaction of the business of the plaintiff at such depot, and essential to the proper and safe conduct of such business there—then you should find for the plaintiff.

" In this case the question arises whether the property can be seized under execution for the payment of the debts of the company, inasmuch as it is held to be essential to the ordinary and economical use of the railroad company. There are certain classes of property belonging to railroad companies not subject to seizure and sale upon execution, such as their tracks, rolling stock, depots, shops and machinery, the use of which is essential to the operation of the road ; the reason for this being that such seizure and sale would result in the destruction of the property. There are certain other classes of property which may be seized and sold upon execution against a railroad company, such as lands and personal property not used in the running and operating of the road. Such property is always subject to execution, and it is the duty of the sheriff to search for this kind of property upon which to levy. An office safe is a necessary part of the furniture in a town where the business is important and extensive, and where the receipts of the railroad company are of so large an amount, and the books required to keep the accounts of the office contain valuable *memoranda*, as that it would be proper and prudent to preserve them from depredation or destruction by the use of a safe.

" And in this case, if you find from the evidence the business here so extensive, the receipts so valuable, as that a prudent man would require the use of a safe, then you should find for the plaintiff."

These instructions correctly stated the law, and were applicable to the facts in the case.

Rorer, in his work on Railroads (vol. 2, p. 901), says : " The

corporate franchise, rights and property of a railroad corporation, incidental thereto, cannot at common law be seized or sold upon execution at law against the company; nor can the appurtenances, easements, appliances, or works used for the practical operation of the road be levied upon or sold at law upon execution separate from franchise, any more, or more legally, than the whole can be sold together. Such sale would impair its value and impede its use by the public;" citing the following authorities: *Gue v. Tidewater Canal Co.*, 24 How. 263; *Rorer Jud. Sales*, sect. 1068; *Coe v. Columbus, P. & I. Rd.*, 10 Ohio St. 372; *Western Pa. Rd. v. Johnston*, 59 Penn. St. 290; *Youngman v. Elmira & W. Rd.*, 65 Id. 278; *Bayard's Appeal*, 72 Id. 453; *Thomas v. Armstrong*, 7 Cal. 286; *Stewart v. Jones*, 40 Mo. 140; *Hatcher v. Toledo, W. & W. Rd.*, 62 Ill. 477; *James v. Pontiac & G. Rd.*, 8 Mich. 91; *Ammant v. New Alexandria & P. T. Co.*, 13 S. & R. 212; *Plymouth Rd. v. Colwell*, 39 Penn. St. 337; *Rorer Jud. Sales*, sect. 1069.

In *Gue v. Tidewater Canal Co.*, TANEY, C. J., says: "It would be against the principles of equity to allow a single creditor to destroy a fund to which other creditors had a right to look for payment, and equally against the principles of equity to permit him to destroy the value of the property of the stockholders, by dis severing from the franchise property which was essential to its useful existence."

In *Herman on Executions* 551, it is said, the rule and common law is that the franchises and corporate rights of a corporation, and the means invested in them which are necessary to the existence and maintenance of the object for which they are created, are incapable of being transferred and granted away by any adverse process against them.

The plaintiff has the right to operate its road through the territory of Montana, and to have all the works and appliances essential to its useful existence as a railroad. This franchise was given by act of Congress, and the road made a military and post road for the benefit of the government of the United States, and whatever is useful in operating the road belongs to and goes with the franchise; and no law of the territory or any other jurisdiction, less than that which created it, can in any manner rightfully invade or impair the privileges and immunities thus conferred. If an office safe at a depot in which the agent deposits and keeps his daily receipts and

valuable papers is useful and facilitates the successful operation of the road, it could no more be seized on execution than could a section of the rails, or road-bed, or water-tank. These things are incidental to the franchise and cannot be disturbed. They are the means by which the franchise is exercised. They are the necessary instruments of its use.

The charter of the plaintiff authorizes and empowers it to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad line, with the appurtenances, from Lake Superior to Puget Sound, and if an office safe at any depot on said road is useful and convenient to the plaintiff in the enjoyment of said franchise, then the same is protected from seizure on execution. This franchise, or right to maintain and enjoy the road, is not limited and restricted to what is barely necessary for that purpose, but extends to what is appropriate and useful, and actually in use. Railroad companies can be made to pay their debts, but the remedy is not by seizing and selling property that would destroy the road, and thereby prevent its earning money for its creditors.

The testimony shows, without question or contradiction, that this safe was an office safe, used by plaintiff in its depot at Billings station, in the regular daily business of the road, and that the same was a necessary part of the equipment and furniture of said depot for the purposes of such business. The court instructed the jury that if it had been proven by a preponderance of the evidence that the safe in question was an office safe, used in the depot at Billings, and that it was a usual and necessary part of the furniture in such office for the safe-keeping of moneys, books of account, and valuable papers used in the transaction of plaintiff's business, and essential to the proper and safe conduct of such business, then that they should find for the plaintiff. The jury, by the verdict for the defendant, must have found from the evidence that the safe was subject to sale, on execution, for the reason that the same was not a usual and necessary part of the equipment and furniture of said depot, and essential and proper to the safe conduct of the business of the road. There is no evidence to support such a finding or verdict. The verdict is a direct contradiction of all the evidence in the case.

The agent of the plaintiff testified that the safe, considering the business at the Billings depot, was a necessary part of the equipment and furniture of the depot for the purposes of such business,

and there was no evidence to contradict the agent, or to call in question his statement as to the necessities of plaintiff's business at that point. But the jury, in answer to a special issue submitted, say that the safe in controversy was not necessary in carrying on the business of the company. In this they contradict the only witness on the subject, and make a special finding, in the very face of all the testimony on the question submitted.

Appellate courts are slow to disturb the verdict of a jury, and will not do so if there is evidence to support the verdict (*Ming v. Truett*, 1 Mont. 328); but if the verdict is a flat contradiction of all the evidence in the case, and there is nothing to support it, it would be a reproach to the law, and to those who administer it, to permit such a verdict to stand.

Judgment is reversed, and cause remanded for a new trial.

GENERAL RULE.—The general rule at common law is that the franchises and corporate rights of a corporation are incapable of being transferred and granted away by any adverse process against it: *Herman on Executions* 551. Applying this rule to railways, it is said that the lands, easements or works appurtenant or essential to the practical use and operation of the franchise of the railway company cannot be sold separate from the franchise so as to impair its value or impede its use. One reason for the existence of this rule is that the public have an interest in the operation of the road which ought not to be destroyed or impaired in any controversy between the railroad company, which is the servant of the public in operating the road, and its creditors. As remarked by *WOODWARD, J.*, "though a (railway) corporation in respect to its capital is private, yet it was created to accomplish objects in which the public had a direct interest, and its authority to hold lands was conferred that these objects might be worked out. They shall not be balked, therefore, either by the act of the company itself or of its creditors. For the sake of the public, whatever is essential to the corporate functions shall be retained by the corpo-

ration. The only remedy which the law allows to creditors against property so held is sequestration (9 W. & S. 28), and that remedy is consistent with corporate existence; whilst a power to alien or liability to levy and sale on execution would hang the existence of the corporation on the caprices of the managers, or on the mercy of its creditors, for, the corporation would cease to exist for the purposes of its institution where its means of subsistence were gone. It might still have a name to live, but it would be only a life in name. A railroad company could scarcely accomplish the end of its being after the ground on which its rails rest had been sold to a stranger:" *Plymouth Rd. v. Colwell*, 39 Penn. St. 339. And in support of the general rule may be cited the following cases: *Youngman v. Rd.*, 65 Penn. St. 286; *Plymouth Rd. v. Colwell*, 39 Id. 337; *Susquehanna Canal Co. v. Bonham*, 9 W. & S. 27; *Annamant v. Turnpike Co.*, 13 S. & R. 210; *Cos v. Rd.*, 10 Ohio St. 372; *Gue v. Tide Water Canal Co.*, 24 How. 263.

Such being the rule and its reason, about which there is no especial conflict of authority, the inquiry is, what property is so essential to the operation of a railway and its lines as to be beyond the

reach of execution, and what property is not essential to the operation of a railway and may, therefore, be levied on under such process ?

PROPERTY EXEMPT FROM EXECUTION AS BEING ESSENTIAL TO THE EXERCISE OF RAILWAY FRANCHISES.—Tolls on a canal are essential to a franchise. So also are locks on a canal, the toll house or collector's office and the land surrounding the outlet locks: *Gus v. Tide Water Canal Co.*, 24 How. 257. See, also, *Susquehanna Canal Co. v. Bonham*, 9 W. & S. 27.

A turnpike road is essential to the franchise of a turnpike company: *Amant v. Turnpike Co.*, *supra*.

Tolls received on a railroad after judgment is rendered against the company and the appointment of a sequestrator are not bound by such judgment so as to give it a preference of payment out of them: *Leedom v. Plymouth Rd.*, 5 W. & S. 265. In *Seymour v. Milford & C. Turnpike Co.*, 10 Ohio 476, it was held that an execution cannot be levied upon the right of a company to take tolls unless notice has first been given according to the provisions of the Ohio statute to some receiver of the toll on the road.

Money payable by railroad for injuries to homestead is exempt from execution: *Kaiser v. Seaton*, 62 Iowa 463, 14 Am. & Eng. Rd. Cas. 405. The railway plant of a dock company authorized to construct a railroad is exempt from execution under the English Railway Companies' Act, though the railway is merely ancillary to the main object of the company: *Great Northern Rd. v. Taborin*, L. R., 13 Q. B. Div. 320; 20 Am. & Eng. Rd. Cas. 562.

The purchaser of a right of way under execution takes no title if he does not own the franchises of the company and the transferee of franchises may recover against him in ejectment: *Eastern Ala. Rd. v. Vischer*, 114 U. S. 340; 20 Am. & Eng. Rd. Cas. 566.

PROPERTY NOT EXEMPT FROM EXECUTION AS BEING ESSENTIAL TO THE EXERCISE OF RAILWAY FRANCHISES.—A canal basin is not a legitimate incident to a railway, having no authorized canal connection, and is not protected from levy and sale on execution against the company: *Plymouth Rd. v. Colwell*, 39 Penn. St. 337; and with reference to railroad lands, this general rule may be affirmed: Lands owned by a railroad company beyond what are actually dedicated to corporate purposes, are bound by the lien of judgments against the company and are liable to be levied in execution and sold by the sheriff as are the lands of any other debtor. But the purchaser at such sale takes only that which is not necessary for the full enjoyment and exercise of the corporate franchise, no matter how acquired by the corporation. See *Plymouth Rd. v. Colwell*, 39 Penn. St. 337; *Youngman v. Elnira, &c., Rd.*, 65 Id. 278.

Land of a foreign railroad corporation not chartered in a state is regarded as simple realty when levied on, but no order will be made affecting the interest of a domestic corporation not a party: *Chapman v. Pittsburgh, &c., Rd.*, 18 West Va. 184; 9 Am. & Eng. Rd. Cas. 484.

When judgment is obtained by a passenger against a railroad company for personal injuries, and execution is levied upon an engine, the execution will not be enjoined on application of creditors of a partnership of which the railroad company was a member, when the equities are equal, and it does not appear that partnership indebtedness existed when the property was taken in execution: *Lamoille Rd. v. Birby*, 55 Vt. 235; 16 Am. & Eng. Rd. Cas. 474.

ROLLING STOCK.—There is a conflict of authority upon the point whether rolling stock is subject to execution or not. As pointed out by Mr. Wood, 3 Wood's Ry. Law 1624, 1625, in several states

rolling stock essential to the operation of the road, as cars, engines, &c., is held to be affixed thereto, so as to pass under a mortgage of the railroad, and not to be subject to levy or sale upon execution: *Gue v. Tide Water Co.*, 24 How. (U. S.) 257; *Youngman v. Elmira, &c.*, *Rd.*, 65 Penn. St. 278; *Shamokin Valley Rd. v. Livermore*, 47 Id. 465; *Coney v. Pittsburgh, &c., Rd.*, 3 Phila. (Penn.) 173; *Macon, &c., Rd. v. Parker*, 9 Ga. 377; *Phillips v. Winslow*, 18 B. Mon. (Ky.) 431. But in New York (*Randall v. Elwell*, 52 N. Y. 521; *Hoyle v. Plattsburgh, &c., Rd.*, 54 Id. 314; *Stevens v.*

Buffalo, &c., Rd., 31 Barb. 590), New Jersey (*Williamson v. N. J. Southern Rd.*, 29 N. J. Eq. 311), New Hampshire, (*Boston, &c., Rd. v. Gilmore*, 37 N. H. 410), and Ohio (*Coe v. Columbus, &c., Rd.*, 10 Ohio St. 372), it is treated as personal property, and, as such, subject to levy and sale upon execution unless it has passed into the possession of the mortgagees. In some of the states the constitution expressly provides that it shall be regarded as personal property, as in Arkansas, Illinois, Missouri, Nebraska, Texas and West Virginia.

ADELBERT HAMILTON.

Supreme Court of Missouri.

DAVIS v. WABASH, ST. LOUIS & PACIFIC RAILROAD CO.

In an action against a common carrier for the loss of goods, where the defence is that the loss was occasioned by the "act of God,"—as in this case an extraordinary flood—the burden of showing that the negligence of the carrier contributed or co-operated with the act of God to produce the loss, is on the shipper.

The defence of the act of God may be shown under a general denial.

APPEAL from St. Louis Court of Appeals.

Noble & Orrick, for plaintiffs.

H. S. Priest, for defendant.

The facts are stated in the opinion, which was delivered by

RAY, J.—This action was begun by plaintiff, to recover damages sustained by his goods, consisting of silks and other valuable dry goods whilst in defendant's possession, as a common carrier. Upon a trial in the circuit court, plaintiffs had a verdict and judgment in their favor for \$6184.29, from which defendant appealed to the St. Louis Court of Appeals, where the same was affirmed, and defendant has appealed therefrom to this court.

The goods, when damaged, were in course of transportation from New York to East St. Louis, by "The South Shore Line" which, it appears, did a "transportation business" over several connected railroads, including that of the defendant.

The merchandise arrived at Toledo on the 11th day of February 1881, and the car, being in a crippled condition, was sent to the

transfer house, where the goods were unloaded and placed on the platform at 2.30 o'clock P. M. of said day, at which time the defendant gave its receipt for the goods, to the connecting road. This transfer house, it seems, is a place where freight going in both directions, east and west, is exchanged by numerous railroads connecting at Toledo, and, as also appears, freight thus passing through said exchange depot is, in the usual and ordinary course of business, subject to some necessary and unavoidable delay, occasioned by the switching, unloading and transfer of the same from one railroad to another. By 8 o'clock P. M. of said February 11th 1881, the defendant had reloaded the goods from the platform of the transfer house into one of its cars, preparatory to shipment of the same to East St. Louis, which car containing plaintiff's goods was left, with other cars, standing at the platform waiting to be attached to defendant's train to St. Louis, which, it seems, would, in the ordinary course of business, leave Toledo about 10 or 11 o'clock that night, or would be switched, with others, in the usual course of business, out of the transfer house at or before 11 o'clock, at which hour the men usually quit work for the night.

The evidence indicates pretty clearly, we think, that in handling and taking the freight in its turn (which was the duty of the carrier in the premises, in the absence of perishable qualities in the property, or other special circumstances, giving it preference), the car in question could not have been gotten out, in the usual course of business, in time for the earlier train for St. Louis that night.

The testimony of Rich and Stowe, who were sworn in plaintiffs' behalf, is, we think, substantially to this effect: About midnight on said February 11th, the waters from a flood in the Maumee river reached the railroad tracks at the transfer house, and soon rose high enough to submerge and damage plaintiff's dry goods whilst in said car at the platform, awaiting shipment. The evidence offered in plaintiffs' behalf, as well as that for defendant, show that the waters in which said goods were submerged, as charged in the petition, were the waters of an extraordinary flood, occurring in the Maumee river.

The character and magnitude of this flood is not called into question, but, on the contrary, it is conceded to have been unprecedented, and such as is denominated an "act of God," properly so called. There is further evidence also offered by plaintiff, tending, at least in some degree, to support the allegation in the petition that defend-

ant negligently permitted the goods to be submerged. The evidence for plaintiff in this behalf is not, perhaps, harmonious; indeed, it is, we think, conflicting and contradictory; but it is sufficient, we think, to meet the objection urged upon us with great earnestness, that there is no substantial evidence of negligence to go to the jury. A summary of this evidence prepared by the Court of Appeals, with special reference to this objection, will be found in the opinion of that court: 18 Mo. App. Rep. 449-454.

The evidence we deem of most importance, and upon which, as the same is now preserved in the record, the liability of defendant, if any, mainly depends, we think, is that tending somewhat to show that defendant was informed and aware of the impending and approaching flood in time to have removed the goods of plaintiff to higher ground or place of safety, and that tending in like manner, to show that it omitted, on the night of February 11th, after it was manifest that there would be an unusual flood and danger therefrom, to employ the force and means employed by other railroads and persons, similarly situated at the time, to move or switch the cars containing plaintiff's goods to the higher ground a half mile west of the transfer house, where they would have been safe from the flood, and which there is evidence tending to show could have been done as late as 11 o'clock that night.

It is not necessary to set out the substance of the testimony in defendant's behalf to the contrary. Reference will be made to its general scope in the further progress of this opinion.

In this connection we may say, as is well said by that court, "We are not concerned with the weight of evidence. If there is substantial evidence of negligence on the part of defendant, directly contributing to the injury, it is quite immaterial that there is a great deal of testimony to the effect that by no diligence could defendant have foreseen or avoided the mischief;" but whilst this is so, such a state of the evidence makes, we think, the *burden of proof* a question of great importance in the case.

The second instruction given at plaintiff's instance is as follows: 2. If the jury believe that the plaintiff's goods were injured while in the possession of defendant, as a common carrier for transportation, it is incumbent on the defendant to *establish* by a fair preponderance of evidence, that the damage or loss was the result immediately and proximately of the "act of God." Proof by plaintiff of the damage and loss of the goods while in the possession of

defendant, as aforesaid, makes a *prima facie* case of negligence or misconduct on the part of defendant, which must be overcome by proof that the injury was the result of an inevitable accident, or, in other words, an act of God, and not its own negligence or misconduct.

If the preponderance of all the evidence does not establish that the direct, immediate and efficient cause of the injury was an inevitable flood or inundation, the defendant is liable, and although the cause of the loss may have been an act of God, such as a great flood in the Maumee river, yet if the defendant unnecessarily exposed the goods of plaintiff to such peril by any culpable or negligent act or omission of its own, it is not excused.

The doctrine this instruction announces on this subject, as to the burden of proof, presents, we think, a serious difficulty in the case, and its propriety, in view of the evidence, and in connection with other instructions given in the cause, is the question we now propose to discuss briefly.

It is familiar doctrine that the law imposes upon the common carrier the obligation of safety as to goods whilst in his possession, and unless relieved from liability by the act of God, or the public enemy, he is responsible in damages, although there may be no actual negligence on his part.

Whenever the loss occurs from *other* causes, the law raises a presumption against him, upon grounds of public policy. If, therefore, plaintiff shows delivery of his goods to the carrier, and a subsequent loss thereof, he need do no more. This is a sufficient statement, ordinarily, of his cause of action, and a showing to that effect is sufficient to make out a *prima facie* case. The *onus probandi* is then on the carrier to bring the case within one or the other of said exemptions. If, in establishing his said defence, facts and circumstances also appear, tending to show that his negligence co-operated to produce the damages, he must, we think, bear the burden of satisfying the jury that they did not directly contribute to the damage, and he is not relieved of liability, unless he so shows. In other words, when the burden is cast on him he must make a case, in which no negligence of his own appears, from the evidence. In that event he is excused *prima facie*, unless plaintiff then shows, or it appears from the facts in the case, that his negligence causes or co-operates to produce the damage complained of. Whether or not the burden is cast upon the defendant to establish one or the

other of said exemptions, which, under the law relieves him, may depend, we think, upon the state of plaintiff's evidence, or, in the language of a text-writer of acknowledged authority, on the nature of the case the plaintiff makes out: see Whart on Neg., sects. 128-129, 661.

Where, as in the case before us, the act of God appears in the testimony in plaintiff's behalf, as a cause of the damage, is the *onus* in that event on the defendant, and does the presumption of law thus declared in the instruction then exist? May the plaintiff, under this state of facts, ignore such exception, appearing in the evidence in his behalf, and insist on this legal presumption, whilst proving, at the same time, the existence in the case of one of the exemptions, which releases the defendant.

The right of recovery must, in this event, depend, we think, upon the alternatives presented by the evidence; or, in other words, upon the facts and circumstances, and inferences of fact properly deducible from the evidence itself. This presumption of law does not, in this event, co-exist with proof by plaintiff of said exceptions, which, under the law, excuse the defendant. This state of the case, which we have been considering upon plaintiff's evidence, was not changed, we think, at the close of all the evidence, so far, at least, as the question we are considering is involved. That for defendant only confirmed the remarkable character of the flood in question, and tended to show that defendant could not have foreseen the danger, or avoided the damage to the goods by the exercise of reasonable and practicable diligence; whilst that for plaintiff, in rebuttal, was as to this conflicting, except as to the character of the flood in said river. It may be well to observe in this connection, that under the ruling of this court in the case of *Ellet v. Rd.*, 76 Mo. 518, this defence is available to the defendant under the general issue, and need not be especially and affirmatively set up.

But it is said that, upon authority, the rule is otherwise, and that the contrary has been declared in several cases in this state. We will examine these cases briefly.

In the case of *Wolf v. The Express Co.*, 43 Mo. 423, the wine, which was the subject of the controversy, arrived at East St. Louis the 31st of December, and was taken in severe weather, from the cars and stored and exposed on a platform for a number of days, and thereby became frozen and damaged. The jury were told that the burden of proving that the injury complained of was caused by

the act of God rested upon the defendant in the first instance, and then they were further told that if the defendant permitted said wine to lay carelessly exposed, and it become damaged thereby, they would find for plaintiff. The instructions were approved, and they are, we think, correct in that sort of a case.

WAGNER, J., speaking for this court, says: "After the damages to the goods have been established, the burden lies upon the carrier to show that they were occasioned by the act or peril which the law recognises as constituting an exemption, and then it is still competent for the owner to show that the injury might have been avoided by reasonable skill and attention."

Again, in the case of *Reed v. Rd.*, 60 Mo. 206, the same judge says for the court that "when the loss of the goods is established the burden of the proof devolves upon the carrier, to show that it was occasioned by some act which is recognised as an exception. This shown, it is *prima facie* an exoneration, and he is not required to go further and prove affirmatively he was guilty of no negligence. The proof of such negligence, if asserted to exist, rests upon the other party:" p. 206.

The remaining case cited by plaintiff in this behalf, is that of *Pruit v. Rd.*, 63 Mo. 529. In that case two certain lots of hogs, the subject of the action, were delivered to the carrier for shipment. There was a very unreasonable delay of a month or more in shipping the hogs, and the snow storm and cold weather occurred in which the hogs were frozen to death or damaged. The court comments on the difference between the rulings of the New York courts and those of Massachusetts, and other courts upon the subject of proximate and remote damages, or damages which the negligence of the carrier concurs with the "act of God" to produce, and the court say it is well to observe that the latest decisions of this court, referring to *Wolf v. Express Co.*, and *Reed v. Rd.*, incline to the position of the New York courts, which hold that where the negligence of the carrier concurs in, and contributes to the injury, the defendant is not exempt from liability, on the ground that the immediate damage is occasioned by the act of God or inevitable accident, but there is no discussion as to the burden of proof in the case.

In *Rd. Co. v. Reeves*, 10 Wall. 189, 190, MILLER, J., speaking for the Supreme Court of the United States, says: "One of the instances always mentioned by the elementary writers of loss by the act of God, is the case of loss by flood and storm. Now, when it

is shown that the damage resulted from this cause immediately he is excused. What is to make him liable after this? No question of his negligence arises, unless it is made by the other party. It is not necessary for him to prove that the cause was such as released him, and then prove affirmatively that he did not contribute to it. If, after he has excused himself, by showing the presence of the overpowering cause, it is charged that his negligence contributed to the loss, the proof of this must come from those who assert or rely on it." Upon the question before us, the case of *Reeves v. Rd.* is cited in support of the text in the case of *Reed v. Rd.*, 60 Mo., and the language of WAGNER, J., in the *Reed Case*, and in that of Wolf v. *The Express Co.*, is almost identical with that employed by Judge MILLER in *Reeves v. Rd.*

The Court of Appeals, in its opinion in this case, uses the following language upon this subject: "It is true that when the evidence for plaintiff shows damage, and, at the same time, '*vis major*' sufficient in itself to account for the damage, there is no presumption that the negligence of the carrier, rather than the *vis major*, was the efficient cause of the damage. The general rule laid down in instruction number two, might, perhaps, by amplification, have been made more fully and exactly applicable to the case presented by the evidence. But the whole instruction taken together was not, we think, misleading."

In this view we are unable, upon the ground indicated, to concur. We think it erroneous, under the authorities of this court, which we have cited, and that it is contradictory and irreconcilable with the sixth instruction, given at defendant's instance, which is as follows: "The court further instructs the jury, that, if the evidence shows that the injury to plaintiff's goods was caused by a sudden, violent and extraordinary flood, at the city of Toledo, whilst the goods of plaintiff were in the cars, in the transfer house at Toledo, the verdict of the jury must be for the defendant, unless the plaintiff has shown that defendant was guilty of some specific negligence, with reference to the goods, which actively co-operated with the act of God to produce the injury." This correct instruction for defendant was neutralized and lost to it by the misleading and contradictory instruction number two, *supra*, given for the plaintiff.

It will be observed that it was not only charged in the petition that defendant negligently permitted the goods of plaintiff to be submerged, but it was also charged that defendant negligently per-

mitted the goods of plaintiff to remain in bulk, wet, after they had been submerged. If this was so, it was a breach of duty, for which defendant would be liable for any aggravation of damages so occasioned. It was the duty of defendants to preserve the property and limit the damages, as far as it could, by the exercise of all reasonable and practicable diligence.

The fourth instruction given for plaintiff, submits this question to the jury, in an instruction, which, we think, is unexceptional in form and phraseology. But we are not satisfied that there was any sufficient evidence in the case authorizing it. In this behalf the Court of Appeals says: "There was evidence that the car could have been opened on February 13th, but I do not find any evidence tending to show that the goods would have been benefited by opening the car then, or that further damage would have been thereby prevented, or how far the goods were injured by not opening the car, as soon as it was accessible."

If the evidence was thus deficient in these respects, and from our examination, we think it is, the instruction should not have been given. James H. Rich, who was an agent of defendant at Toledo, but testifying in plaintiff's behalf, says: "The floor of the transfer house was covered with water for over two days. We couldn't have gotten into the transfer house for four days after the flood, then found the floor covered with mud and water. It would have been impossible for us to handle the goods on the platform without injuring them." To a like effect is the testimony of Doan Blinn, testifying for defendant in this behalf.

The evidence shows that defendant put its force at work removing the ice and other obstructions, and gained access to the transfer house by the 17th of February, whereas other railroads similarly situated, did not reach their warehouses for several days thereafter; and further shows that it then forwarded the goods to St. Louis, where they arrived February 23d. The evidence does not show that this was not as prudent and reasonable course as the defendant could have adopted under the circumstances, or that the damages to the goods were increased any by this course of defendant.

The instruction being without evidence sufficient to justify a finding upon this issue, was, for that reason, we think, improperly given.

For those reasons, we are of the opinion that the judgment of the Court of Appeals, as well as that of the Circuit Court, should

be reversed, and the cause remanded for further proceedings, in conformity herewith, and it is so ordered.

All concur.

The authorities are in conflict upon the question of the principal case, as to whether when the carrier relies upon the fact that loss was occasioned by the act of God, he must go further than the mere proof of that fact and show that there was no negligence or want of due care on his part, but for which the goods would not have been exposed to danger.

The doctrine of one class of cases is that when the carrier alleges and relies upon an exception to his liability by the ordinary rule of presumption against him he must bring himself fully within such exception, not merely by showing that the goods were lost from a cause for which, either by the law or by the terms of his contract, he cannot be held responsible, but by going further and showing he exercised at least ordinary skill and care to avoid or escape from the calamity; and that it must appear that, notwithstanding such care and skill, it was unavoidable: *Hutchinson on Carriers*, sect. 766, p. 593. In other words, it is held that the burden is on the carrier, not merely to show that the goods perished, or were damaged by the excepted accident or peril, but that he was free from any negligence contributing to it, and could not by the use of care and diligence have prevented it or its consequences, the very fact of the loss of the goods being *prima facie* evidence of negligence, the burden of rebutting which is cast upon the carrier: *Id.*

The doctrine of the other class of cases is that when the carrier has shown that loss was occasioned by any of the causes, against liability for the consequences of which he is protected by law or by his contract, it will not be presumed that his negligence in any degree contributed to the loss, but that, on the contrary negligence being in itself a positive wrong,

the presumption, in the absence of proof to establish it, will be that the carrier has done his duty, and that consequently, when it has been shown that the loss resulted from any of such causes, under circumstances which do not show negligence, the burden of proving such negligence, devolves upon the plaintiff. And this view of the question seems to be supported by a decided preponderance of authority in America: *Hutchinson on Carriers*, § 767, pp. 593-594; *Lawson on Carriers*, § 248, pp. 373-5, note 12; 2 *Greenl. Ev.* (14 ed.), sect. 218, note b, p. 206.

That the burden of proving negligence devolves upon the shipper is also the English doctrine: *Richardson v. Sewell*, 2 *Smith (Q. B.)* 205; *Czuek v. Gen. Steam Nav. Co.*, L. R., 3 C. P. 14; 37 L. J. C. P. 3; 16 W. R. 130; 17 L. T. (N. S.) 246; *Ohrloff v. Briscall*, L. R., 1 P. C. 231; 12 *Jur.* (N. S.) 672; 35 L. J. P. C. 63; 15 W. R. 202; 14 L. T. (N. S.) 873; 4 *Moore P. C. C.* (N. S.) 70; *Lawson on Carriers*, § 248. In cases where the evidence leave the question of negligence in doubt it was held, as in *Muddle v. Stride*, 9 *Car. & P.* 380, that the burden of proof is upon the plaintiff after defendant had shown that the damage to the goods was caused by the act of God. In this case Lord DENMAN charged the jury that, if on the whole in their opinion, it was left in doubt what the cause of the damage was, then the defendant would be entitled to the verdict because they must clearly find the defendant guilty of negligence before they could find a verdict against him, and that if it should appear from a full consideration of the case, that the injury might as well be attributable to the one cause as to the other, then the defendant would not be liable for negligence.

In *Wertheimer v. Rd.*, 17 Blatchf. C. 421, on arrival of the car containing the goods a mob took possession of it, and continued to hold it against the military power of the state, and ultimately fired and destroyed the goods. It was held that the shipper must prove that the loss arose from the negligence of the defendant, and that in the absence of such proof the defendant was not liable for the value of such goods. WALLACE, J., said (p. 422), "The effect of the contract made between the parties was to impose upon the plaintiff the burden of proving that the loss of the goods by fire arose from the negligence of the defendant or its agents."

In *Clark v. Barnwell*, 12 How. 272, Mr. Justice NELSON says: "That although the injury may have been occasioned by one of the excepted causes in the bill of lading, yet still the owners of the vessel are responsible if the injury might have been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods. But the *onus probandi* then becomes shifted upon the shipper to show the negligence. In *Transportation Co. v. Downer*, 11 Wall. 129, the judgment of the court below was reversed, because the jury were instructed that it was incumbent upon the defendant, the carrier, to bring itself within the exception, by showing that it had not been guilty of negligence. Other authorities need not be cited, as the cases referred to are conclusive upon this court. The plaintiffs have not shown negligence on the part of the defendant, and therefore cannot recover."

In *Colton v. Rd.*, 67 Penn. St. 211, the goods were destroyed by fire while on the road. The bill of lading contained "the dangers incident to railroad transportation, fire and other unavoidable accidents excepted." The court held that the *onus* of proof as to fault was on the transporter, approving *Farnham v. Rd.*, 55 Penn. St. 53. See also *Lamb v. Cam-*

den & Amboy Rd. & T. Co., 46 N. Y. 271, for an elaborate consideration of this question, and the dissenting opinion by FROCKHAM, J., on p. 282, *et seq.* "If the carrier proves that the injury or loss was occasioned by one of those occurrences which are termed the 'act of God,' *prima facie* he discharges himself, and the *onus* of proving that the alleged cause or agency would not have produced the loss or injury without his negligence or defective means, is thrown upon the plaintiff." *New Brunswick Nav. Co. v. Tiers*, 24 N. J. (Zab.) 697.

The following cases hold the same rule: *Wescott v. Fargo*, 61 N. Y. 542; *Steers v. The Steamship Co.*, 57 N. Y. 1; *The Black Warrior*, 1 McAll. 181; *Wilson v. S. P. Rd.*, 13 Rep. (Cal.) 302.

While a majority of the authorities declare the doctrine as above, that the burden of proof is upon the plaintiff, there are a large number which lay down the rule that the *onus* is upon the carrier to show that he was not negligent, and that the loss was due wholly to one of the excepted causes, to relieve himself from liability. The theory in support of this view is thus stated by the Supreme Court of Georgia: "What shipper, when he demands his cotton at the place of delivery, is satisfied to be told that it was burnt? He wants to know how it was burnt; and the carrier is bound to give the explanation, for he and his servants alone can do it. He is only excused if the fire was unavoidable, and he should prove that it was so. It is, I repeat, in his power to show the facts, and it should for that reason be made his duty to do so. Shippers are obliged to trust to carriers. In the servants and employees of the carrier the shipper will always find reluctant witnesses. Why force the owner of produce to make them his witnesses, and thus endorse their credibility? In Tennessee, the employees and servants of railroads are not allowed to be witnesses in behalf of their employers. Why compel plaintiffs to make them

their witnesses, and bind them by the truth of their testimony? The more negligent they have been in the discharge of their duty, the more difficult it will be to extort the truth from them. Could they be expected to swear that the cargo was burnt by their negligence? To place the *onus* upon the plaintiff would be to deny all redress. I admit the general rule that he who alleges must prove. But it is equally well established the burden of proof should be upon him who best knows what the facts are. If it be said that the agents and servants may be resorted to by the shipper as well as the carrier, we have only to repeat that their wishes, feelings and interests are all on the side of their employers. Let the carrier then prove the loss and the manner of the loss. Policy as well as safety of all concerned demand the establishment of such a rule:” *Berry v. Cooper*, 28 Ga. 543. In *Baker v. Brinson*, 9 Rich. (S. C.) 201, by contract the carrier’s liability was limited. In that case, it is said (p. 203) “That is a sound rule which devolves the *onus* on him who best knows what the facts are. In cases of loss, proof of delivery devolves at once on the carrier, the *onus* of exempting himself from liability, and nothing can be more reasonable, before he can take shelter under an exception, to require proof of his care.”

Many other cases hold the same doctrine: *Whitesides v. Russell*, 8 W. & S. 44; *United States v. Backman*, 28 Ohio

St. 144; *Mann v. Birchard*, 40 Vt. 326; *Roberts v. Riley*, 15 La. Ann. 103.

Mr. Greenleaf lays down the rule that in all cases of loss of a common carrier the burden of proof is on him, to show that the loss was occasioned by the act of God, or by public enemies: 2 Greenl. on Ev. (14th ed.) § 219. And it has been laid down that if the acceptance of the goods was special, the burden of proof is still on the carrier, to show not only that the cause of loss was within the terms of the exception, but also that there was on his part no negligence or want of due care: 2 Greenl. Ev. (14th ed.) § 219; *Swindler v. Hilliard*, 2 Rich. 286; *Whiteside v. Russell*, 8 W. & S. 44; *Slocum v. Fairchild*, 7 Hill (N. Y.) 292.

See the elaborate exposition of the meaning of the term “act of God,” respecting the degree of care to be applied by common carriers in order to entitle them to its protection by COCKBURN, C. J., in *Nugent v. Smith*, L. B., 1 C. P. D. 428; 34 L. T. Rep. (N. S.) 827; s. c. 14 Alb. L. J. 164, a decision of the English Court of Appeals. See, also, *Chicago & N. W. Ry. v. Sawyer*, 69 Ill. 285; s. c. 18 Am. Rep. 613; *McGraw v. B. & O. Rd.*, 18 W. Va. 361; s. c. 41 Am. Rep. 696; *Nashville & Chattanooga Rd. v. David*, 6 Heisk. (Tenn.) 261; s. c. 19 Am. Rep. 594; 2 Greenl. on Ev. (14th ed.) § 219 and notes.

EUGENE MCQUILLIE.

St. Louis, Mo.

Supreme Judicial Court of Massachusetts.

RIDGEWAY STOVE CO. v. WAY.

An innocent purchaser of certain dwelling-houses, in which furnaces had been attached to and become a part of the realty, is not affected by an agreement between his grantor and the vendor of the furnaces, by the terms of which the latter was to retain the property in the furnaces until they were paid for.

Furnaces placed in the cellar of a house, upon a row of bricks, set in a circle, with pipes fastened to the ceiling of the cellar, and connecting with the chimney and registers of the house, are annexed to and become a part of the realty, and will pass by a deed of the land.

THIS was an action of tort for the conversion of two portable furnaces, with pipes, registers, register borders, and register boxes. At the trial in the Superior Court, without a jury, before KNOWLTON, J., it appeared that one William Coady was the mortgagor in possession of certain real estate in Boston, consisting of two dwelling-houses, with the land under and adjoining them. Said Coady, in July 1884, agreed with the agents of the plaintiff that the plaintiff should place in each of these houses a portable furnace, with the pipes and registers connected therewith; that said furnaces, pipes and registers should remain the property of the plaintiff; that said Coady should pay \$100 in cash when the furnaces should be placed in the houses, and thereafter should pay a rental of \$35 a month for said furnaces until the rentals, together with \$100, should amount to \$240, when all title to the furnaces in the plaintiff should cease; and that this lease of the furnaces should be put in writing, and signed by Coady. Coady explained to the agents of the plaintiff that the houses would rent for \$30 a month each, and that, with the money thus received, he would be able to pay for the furnaces before the interest on his mortgage and his taxes would have to be paid. The houses had just been built by Coady, and were then ready for occupation. In pursuance of this agreement the agents of the plaintiff took two furnaces from their stock, and set them up in the cellars of the houses. The manner of setting up the furnaces was as follows: Four bricks were set on end on the floor of the cellar. The base rim of the furnace was placed upon these bricks. Other bricks were set on end in a circle under the rim, with the mortar between the bricks, but no mortar between the upper surface of the bricks and the rim; and then the other parts of the furnace were placed upon the rim. The rim, resting on the circle of bricks, made a joint as tight as was necessary. An open space was left in the circle of bricks to allow the air from the cellar (or from out doors, by means of a cold-air box) to pass up through the furnace. At the time of the alleged conversion, a cold-air box had been connected with one of the furnaces, but the other had none. There were holes in the top of the casing of the furnace, and collars were placed in these holes. The hot-air pipes fitted over these collars, resting on the top of the furnace, and were supported at the further end by wires passing under the pipes, and fastened to the ceiling of the cellar. The hot-air pipes were slipped into stationary pipes, which had been placed in the houses by Coady

when the houses were built, leading from the ceiling of the cellar upward, through and between the partitions to the rooms of the house. The smoke-pipe passed into the chimney. Each soap-stone register border was placed in a hole in the floor, resting on a ledge of wood. The registers were set in the several rooms, and each register and register box rested on the soap-stone border, and connected with the stationary pipes. Neither furnaces, pipes, boxes, borders, nor registers were in any other manner attached to the houses or land. There were holes into the chimney from the rooms of the houses, so that stoves could be used to heat the houses.

On September 8th, in pursuance of his previous agreement, Coady signed and delivered to the plaintiff a paper, in which he (Coady) set forth that he had hired and received of the Ridgeway Stove Company the furnaces, pipes, registers, &c., mentioned above, for the use of which he promised to pay said stove company, the sum of \$35 a month until the sums paid should amount to \$240, when all rent or claim of the stove company, or its representatives, to said furniture, should cease; but in case of neglect of said Coady to pay for said use and rent, before such time as said sums so to be paid for use and rent should amount to the said sum of \$240, said stove company and their legal representatives were to have the right to enter any house or place where the said furniture should be, and remove the same. November 26th, the defendant received from Coady a warranty deed of the real estate. There was evidence that it was given as part of an arrangement by Coady to obtain money to effect a compromise with his creditors, and there was no evidence to control the recital of a valuable consideration contained in it. Nothing was said in the deed about the furnaces. In December the plaintiff demanded the furnaces of the defendant, who refused to allow the plaintiff to remove them, and claimed them under his deed from Coady. The plaintiff never has received any money in payment for the furnaces, or for the use of them, but it received an order for \$100, drawn by Coady on John S. Lamphrey, and accepted, which it receipted for as a payment of that sum, but which it has not collected.

The defendant testified that he went into one of the houses, and through some of the upstairs rooms, before he took his deed, and saw some of the registers, but that he never saw the furnaces until after this action was brought. There was no evidence offered tending to show that he knew of the existence of the furnaces when he

took his deed, except what appears in these exceptions. There was no other evidence that he ever made any inquiries about the furnaces from Coady, or any one else. The plaintiff offered the testimony of its agent, Rowe, who made the arrangements with Coady, and who placed the furnaces in the houses, as to whether or not the plaintiff, when it placed the furnaces in the houses, intended that they should become a part of the houses, and also the testimony of Coady as to whether or not he intended, when the furnaces were placed in the houses, that they should become a part of the house. The court excluded this testimony, and ruled that the secret intention of Coady and of the plaintiff, not manifested by their acts or words, could not be put in evidence to affect the defendant, but admitted evidence of their acts and agreements.

The court found as a fact that the property claimed in the plaintiff's writ was annexed to and became a part of the realty, and passed to the defendant by his deed; that Coady built his houses with a view to their being heated by furnaces similar to these, and that these furnaces were of a kind ordinarily designed to be kept and used, as long as they are of any value, to heat the houses in which they were originally set up; and that both Coady and the plaintiff intended that the furnaces should become a part of the realty, but that they both further intended that the furnaces should not become a part of the realty until they should be paid for; and ruled that this second intention on their part could have no effect upon the rights of the defendant. The court declined to rule that upon all the evidence the defendant was not a *bona fide* purchaser for value; and found as a fact that he was, and that he had no knowledge or information of any agreement or understanding affecting the rights of an owner of the realty; and also declined to rule that, if the defendant was a purchaser for value, he was put upon his inquiry as to whether the furnaces were a part of the realty or not, and, having neglected to make any inquiries, that he was affected with notice of what he would have found upon inquiry, to-wit, that these furnaces were the property of the plaintiff. The court found for the defendant, and the plaintiff alleged exceptions.

Brown & Keyes, for plaintiff.

E. M. Bigelow, for defendant.

MORTON, C. J.—It is quite clear that the Superior Court was

justified in finding that the property claimed on the plaintiff's writ was annexed to and became a part of the realty, and passed to the defendant by his deed. The property claimed consisted of two portable furnaces, with the pipes and registers attached to them. They were put in as part of the two houses, were essential to the enjoyment and use of them as dwelling-houses, and were intended by the owner to be a part of the realty as soon as they were paid for. The fact that there was an agreement between the owner and the plaintiff that the furnaces should remain the property of the plaintiff until they were paid for, and that both so intended, is immaterial, unless the defendant had notice of such agreement and intention. Notwithstanding such an agreement, the property annexed to the realty will pass to an innocent purchaser without notice: *Southbridge Sav. Bank v. Exeter Machine Works*, 127 Mass. 542, and cases cited. As the Superior Court found in the case at bar that the defendant was a *bona fide* purchaser of the houses, without notice of the agreement of the plaintiff, it follows that his rights are not affected by such agreement, and that the property in suit passed by his deed of them. The facts that the defendant did not see the furnaces before he bought, and that he did not make any inquiries about them, are immaterial. He bought the houses as they were, and there was nothing to excite his suspicions, or to put him upon inquiry. The court could not properly rule, as requested by the plaintiff, that, as the defendant made no inquiries, "he was affected with notice of what he would have found upon inquiry, to wit, that these furnaces were the property of the plaintiff."

Exceptions overruled.

Furnaces have, in the past, been quite a fruitful cause of litigation, and the earliest reported cases upon the law of fixtures relate to the right of removing them. Many of the old cases arose between landlord and tenant, and proceed upon distinctions as to the method of attachment which are now untenable.

In the case reported in 20 Henry VII. 13 b., pl. 24, decided in the year 1504 (21 Hen. VII. 26 b., is probably another report of the same case), it was held that a furnace erected by the ancestor, and annexed to the frank-tenement with mortar, was parcel of the realty, and could not

lawfully be removed by his executors as against the heir. Doubtless, this furnace was erected for purposes of trade, but the principle involved remains unchanged to this day.

In *Squier v. Mayer*, 2 Freem. Ch. 249; s. c. 2 Eq. Ca. Abr. 430, decided in 1701, it was held, on the other hand, that a furnace, though fixed to the freehold and purchased with the house, should go to the executors and not to the heir. This case, so far as it relates to the furnace, may be considered as overruled. See *Ewell on Fixtures*, p. 214, note.

The general rule undoubtedly is that all fixtures, whether actually or constructively annexed to the realty, pass by a conveyance or mortgage of the freehold where there is nothing to indicate a contrary intention; and furnaces are not an exception to this rule where they are intimately connected with the house: *Main v. Schwarzwelder*, 4 E. D. Smith 273; *Mather v. Fraser*, 2 Kay & J. 536; s. c. 2 Jur. (N. S.) 900.

In *Stockwell v. Campbell*, 39 Conn. 362, a portable hot-air furnace placed by the owner of the freehold in a pit prepared for it in the cellar of a house, but not set in brick or otherwise fastened to the house or floor, but held in its place by its own weight, together with the smoke-pipe leading therefrom to the chimney, all capable of removal without injury to themselves or the house, but intended as a permanent annexation, as appeared from the pit in the cellar adapted to its size and depth, were held to be a part of the realty, rendering the whole house subject to a mechanic's lien for the value thereof and the labor of setting them in the house.

With respect to the main question in the principal case, there is some conflict of authority. It may be stated as a general rule that fixtures placed upon demised premises by a tenant, and which are removable by him during his term as against his landlord; annexations made upon the land of another under an agreement reserving the right of removal, and also fixtures sold by the owner of the land to a third person but not actually severed, do not pass by a subsequent conveyance or mortgage of the land to one having notice of such right: *Coleman v. Lewis*, 27 Penn. St. 291; *Davis v. Buffum*, 51 Me. 160; *Wilgus v. Gettings*, 21 Iowa 177; *Sweden v. Craig*, 26 Id. 156; *Morris v. French*, 106 Mass. 326; *Hensley v. Brodie*, 16 Ark. 511; *Mitchell v. Freedley*, 10 Penn. St. 198; *Hunt v. Bay State Iron Co.*, 97 Mass. 279; *Ha-*

ven v. Emery, 33 N. H. 66; *Pierce v. Emery*, 32 Id. 484.

In the case of annexations to the land of another by his consent, under an agreement, express or implied, that the property shall remain the personal property of the person who annexed it, such person being in possession neither of the land nor the annexation thereto, the article annexed is as between the immediate parties to such agreement, unquestionably mere personalty. And by the courts in several states it is held that such annexation retains its character of personalty as against third persons purchasing or taking a mortgage upon the land upon which it stands, *bona fide*, and without notice of such agreement; that it does not pass with the land, and may be removed by the party annexing it as against such *bona fide* purchaser or mortgagee: *Russell v. Richards*, 10 Me. 429; s. c. 11 Id. 371; *Hilborne v. Brown*, 12 Id. 162; *Tapley v. Smith*, 18 Id. 12; *Ford v. Cobb*, 20 N. Y. 344; *Godard v. Gould*, 14 Barb. 662. See, also, *Mott v. Palmer*, 1 N. Y. 564; *Hensley v. Brodie*, 16 Ark. 511; *Crippen v. Morrison*, 13 Mich. 34; *Sheldon v. Edwards*, 35 N. Y. 279; *Tift v. Horton*, 53 Id. 377.

The rule above stated has, however, been often disapproved; and, in our opinion, the better rule, and one more in accordance with the policy of the recording laws of this country, is to require actual severance or notice of a binding agreement to sever, in order to deprive the purchaser or a creditor levying upon the land and fixtures of the right to the fixtures or appurtenances to the freehold: *Fortman v. Goepper*, 14 Ohio St. 565; *Brennan v. Whitaker*, 15 Id. 446; *Powers v. Dennison*, 30 Vt. 752; *Davenport v. Shants*, 43 Id. 546; *Hunt v. Iron Co.*, 97 Mass. 279; *Haven v. Emery*, 33 N. H. 66, 69; *Bringholff v. Munenmaier*, 20 Ia. 513; *Fryatt v. Sullivan Co.*, 5 Hill 116; *Trull v. Fuller*, 28 Me. 545; *Prince v. Case*, 10 Conn. 375; *Landon v. Platt*, 34 Id. 517.

See, also, *Dostal v. McCaddon*, 35 Ia. 318; *Pierce v. George*, 108 Mass. 78; *Bratton v. Clawson*, 2 Strob. Laws 478; s. c. 3 Id. 127; *Thropp's Appeal*, 70 Penn. St. 395.

the correctness of the decision in the principal case, of which, as it seems to us, there can be no reasonable doubt.

M. D. ESWELL.

Chicago.

A study of these cases convinces us of

LEGAL NOTES.

THE Court of Errors and Appeals of New Jersey, by their recent decision in *State Board of Assessors v. State*, 4 Atl. Rep. 578, have added one more to the leading cases on the constitutionality of laws creating classes of property for taxation, viewed in connection with the requirements of both state and federal constitutions. The case was argued by counsel of acknowledged ability, and in addition to the opinion of the court five others were filed, two concurring, one dissenting and two partially concurring, partially dissenting. The judgment of the Supreme Court, which was brought up for review, declared the Act of April 10th 1884 to be in contravention of the requirement of the state constitution that "property shall be assessed for taxes, under general laws and by uniform rules, according to its true value." The act referred to directed that all the property of railroad and canal companies used for railroad or canal purposes, including their franchises, should be assessed for taxation by a special state board appointed for the purpose, in the manner therein described, which differed materially, both in ascertaining values and in the rate of tax, from the assessment of other similar property not used for railroad or canal purposes. The view taken by the majority of the court is thus stated by Chancellor RUNYON: "The power of taxation is in the legislative branch of the government alone. It is unbounded except as it may be limited by constitutional restraint. A law which taxes a class of property separately is not unconstitutional if it embraces all property of that class and applies to it uniform rules, and taxes it according to its true value. The constitutionality of such a law is to be determined in the same way in which it would be determined if the property taxed were the only property taxed in the state;" and is also fairly summarized in the following extract from the dissenting opinion of Judge DEPUE: "As I understand the views of the majority of the court, it is not claimed that the Act of 1884 provides for taxation either for state or local purposes on a rule uniform with that on which taxes, state or local, are laid under the general tax act of 1866. The position taken is this: that the constitutional provision allows a classification of property for taxation under general laws, and that, upon such a classification the rule of uniformity prescribed by the constitution is complied with if the tax be laid upon property within the classification of an equal percentage, without regard to the rate of taxation upon other taxable property in the state; that local taxes may be laid on property in the classification at one rate, and upon other property at a different rate, and state taxes be levied with the same diversity in rates, provided only that a uniform rate be observed in the tax upon property within each class;

and that property used for railroad and canal purposes may be segregated into a class, and subjected to taxation at any rate that may be prescribed by the legislature." On support of these views the court relied upon the fact that substantially the same method of taxation had existed in New Jersey since 1873, and had received their sanction in *Van Riper v. Parsons*, 40 N. J. Law 123, and in *N. J. S. Rd. Co. v. Board Rd. Com's.*, 41 Id. 235; upon the decision of the Supreme Court of the United States in *State Railroad Tax Cases*, 92 U. S. 575; and finally upon their own interpretation of the constitutional restriction, which was, to quote from the opinion of DIXON, J., who concurred on this point that the "expression 'uniform rules' is not of wider import than the expression 'general laws,' and if the latter may be confined to a class, with equal propriety may the former. * * * Its collocation with the words 'general laws' indicates that it was to have a corresponding meaning, and the whole sentence becomes harmonious by holding that it requires the same regulations to be applied to every member of each class which the general laws recognise or establish."

The court carefully distinguishes the case from the *San Mateo Case*, 13 Fed. Rep. 722 and the *Santa Clara Case*, 18 Id. 385, and holds that the act in no way conflicts with the 14th amendment to the federal constitution. It further takes occasion to declare that franchises are property and as such taxable.

Judge DUPUE, in his dissenting opinion, claims that the constitutional question not having been directly raised in *State v. Rl. Com's.*, *supra*, that case cannot be regarded as an authority, and that the *State Ry. Tax Cases* depended upon the peculiar language of the constitution of Illinois and do not cover the case in hand. He then interprets the constitutional restriction thus: "the constituent parts of the sentence, 'general laws' and 'uniform rules' are made essential to a valid act of taxation," and continues: "Under an organic law for taxing property at its true value there can be no classification except as a means of ascertaining true values. Different kinds of property have different grades of value; but true value is a characteristic of all kinds of property, and peculiar to no one species so as to make it a class by itself. The classification adopted in this act is upon the use to which the property is devoted; but the use to which property is applied does not alter its true value. An engine is of the same market value in the shop of a manufacturer as when placed upon a railroad track. * * * But it is said that the property of these companies possesses peculiar qualities distinguishing it from the property of private individuals or other corporations, in the fact that it is associated with and is necessary for the exercise of the corporate franchises, or of the business of operating railroads or canals, and therefore may be disassociated from other property intrinsically of the same nature, for a different sort of taxation, or for taxation at a different rate. Such a mode of taxation is not taxation on property at its true value. It is that method of taxation which can lawfully be resorted to only in the exercise of the power of indirect taxation, by taxation upon franchises, trades or occupations, and this act has none of the features of such a mode of taxation. It is what its title imports, taxation of property. As such, I think the mode in which it is exercised is not in conformity with the constitutional provision."

DIXON, J., and REED, J., while concurring with the majority of the court on the general question, thought certain features of the act relating to the taxation for local purposes of a part of the property owned by these companies and used by them for the purposes of their business unconstitutional. On this point the opinion of the court reads: "The objection is made that under the act only the property mentioned in subdivision 2 of section 3 (real estate used for railroad or canal purposes, not including main stem or water way) is subjected to assessment for taxation for county and municipal purposes, whereby it is argued the companies escape their share of county and municipal taxation in respect of the main stems or the water ways, and the tangible personal property in the taxing districts. But if the taxes be but one tax, and the legislature has the right to fix the amount of that tax by the means adopted, it follows that the objection is without actual foundation: for the legislature has a right to say what tax the companies, in view of the peculiar character of their property, shall pay, and in what way it shall be assessed, provided it makes the assessment under general laws and by uniform rules according to the true value of the property." The foregoing extracts will serve to indicate the three different views of the question presented in the several opinions filed.

Henry Bill Publishing Company v. Arthur H. Smythe, 27 Fed. Rep. 914, recently decided in United States Circuit Court for the Southern District of Ohio, is worthy of note as a case of first impression upon a question of more than usual interest.

The plaintiff was the owner of the copyright of a book, written by James G. Blaine, called "Twenty years of Congress," and sold it by subscription only to individual buyers of single copies. The book had never otherwise been placed upon the market by the plaintiff, or with its consent. It employed agents to solicit subscriptions and deliver the copies ordered, assigning to each a certain territory. An agent so employed in New York, to whom plaintiff had sent a number of copies for delivery to certain subscribers, procured by him, sold the copies to a book-dealer in Troy, contrary to plaintiff's instructions and in violation of an express agreement and his bond, that he would not sell or deliver in any other mode than that directed by the plaintiff, applying the money to his own use. It did not appear whether the Troy dealer was aware of this breach of trust, or a party to it by collusion with the agent, but it did appear that it was generally known to the trade, and especially to the defendant, that the plaintiff professed to sell the books only by subscription, and had announced by public advertisement and otherwise that in no other way could it be procured from the publishers. The defendant had expressed the belief that the trade could procure the work notwithstanding this announcement, and that he would soon have it for sale. He ordered the book from the Troy merchant, procured six copies of those purchased from the plaintiff's agent in the manner above stated, and sold five of them at a profit of \$5 86. The defendant testified that he was not aware of the facts connected with the Troy dealer's purchase, and there was no proof that he was. He ordered the books without any inquiry upon the subject, and in the usual way of making such orders. The plaintiff's agent at Columbus, Ohio, where defendant did business, notified him that he was the only

authorized agent for that section; that the book sold only by subscription, and warned him not to sell the copies he was offering, but the agent did not himself know how the books had been procured. This bill was filed to enjoin the defendant from selling these copies, for an account, if sold; and from selling the book at all in the future without plaintiff's authority.

Judge HAMMOND, at the outset of his opinion, frankly admits that to him "it was a startling proposition that in the immense trade that goes on in copyright books, the dealer must deraign his title from the copyright holder to each copy, with all the particularity of real estate, if not more inexorably: and that no right to use or sell a copy could be acquired without his consent." He adds: "And I did not see how the argument and the case of the plaintiff could stop short of that claim. And yet I am unable now to see how that monopoly of sale granted by the statute can be secured without a principle almost as broadly stated as that; qualified, of course, by such limitations as properly and justly should be imposed to estop him by his own conduct, in any given case, from relying on the principle just stated. How can his right of sale be exclusive without that principle in its widest scope?"

He then reviews at some length the English Copyright Acts, pointing out that they seem to omit the words used in our acts in reference to the "sole liberty of * * * vending," and calls attention to the definition given by Congress to the word "copyright" as the sole right "of printing, publishing and *selling* his literary composition or book." The necessity for this peculiarity of our statute is then considered, and the conclusion reached that "protection in the monopoly of sale for the lawfully printed copies is just as essential to the value of the right of property created by the statute as protection against piratical printing, publication and sale of the book." "Or, if this be not so, Congress has chosen, at least, to grant that right of monopoly, and it may grant what it pleases. It does the same thing for mechanical inventions, and why not for literary products? I think it has." The precise ruling he makes, to quote his own words, is this: "If the owner of a subsisting copyright seeks to enjoy his exclusive right of selling the published work by making sales directly and only to individual subscribers, the statute protects his monopoly from interference, by other dealers offering surreptitiously obtained copies of the genuine work, without his consent, unless there be something in the circumstances of the particular case to estop him from relying on the privileges of his monopoly." He finds that the circumstances of the case were sufficient to put the defendant on inquiry as to his vendor's authority to sell, and that Mr. Blaine's conduct in the premises was not such as to estop him from asserting his monopoly of the privilege.

The remainder of the opinion is taken up with a review of the cases bearing upon the subject from which support for the ruling is derived, in the course of which the case in hand is carefully distinguished from *Clemens v. Estes*, 22 Fed. Rep. 899, where agents had *purchased* copies of the book and bound themselves not to sell except by subscription. A decree was entered enjoining defendant from selling the only copy of the book in his possession, and directing him to pay over the profits on those sold; but the court declined to enjoin him from dealing in the book for the future.

The decision reached, while somewhat startling, seems to be logically deduced from the premises, and on reflection, it will, we think, appear that the danger of serious inconvenience to the public from its practical application is more fancied than real, while the protection it extends to authors in the enjoyment of their works is as efficient as it is desirable.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF FLORIDA.¹

SUPREME COURT OF ILLINOIS.²

SUPREME JUDICIAL COURT OF MAINE.³

SUPREME COURT OF RHODE ISLAND.⁴

SUPREME COURT OF VERMONT.⁵

AGENT. See *Insurance*.

ASSIGNMENT.

Order on Fund—Garnishment.—An order, draft or bill, drawn for valuable consideration for the whole of a particular fund, is an equitable assignment of such fund to the payee: *Lee v. Robinson*, 15 R. I.

Such an assignment is valid against a creditor subsequently garnishing, even if the garnishee was not notified of the assignment until after garnishment, provided he has time to disclose it by affidavit before judgment: *Id.*

ASSUMPSIT.

When Liability therefor arises.—If a party continues to occupy and use premises after being notified by the owner that if he does so he will be expected to pay rent, the occupant will thereby become liable to the owner for the use and occupation: *Illinois Cent. Rd. v. Thompson*, 116 Ill.

Money had and received.—Where one has paid to another money on a contract, and subsequently there is a rescission of the contract entitling the former to recover a part of the money so paid, he may do so upon a count for money had and received: *Evans v. Givens*, 21 or 22 Fla.

ATTACHMENT. See *Assignment*; *Partnership*.

Debts not due.—Where it is attempted to join in one attachment, proceedings for debts due and for others not due, and the allegations of the affidavit as to the debt not due are insufficient, they will not vitiate the

¹ From D. C. Wilson, Esq., Clerk. The cases will probably appear in 21 or 22 Florida Rep.

² From Hon. N. L. Freeman, Reporter; to appear in 116 Ill. Rep.

³ From J. W. Spaulding, Esq., Reporter; to appear in 78 Me. Rep.

⁴ From Arnold Green, Esq., Reporter; to appear in 15 R. I. Reports.

⁵ From Edwin L. Palmer, Esq., Reporter; to appear in 58 Vt. Reports.

allegations or proceedings as to the debts which are due, but will be treated as surplusage: *Tunner & De Laney Eng. Co. v. Hall*, 21 or 22 Fla.

That attachment proceedings for debts due and those not due can be joined in the same suit doubted, but not decided: *Id.*

The purpose of the statutory provisions as to an attachment for a debt not due, in requiring an affidavit that the debt or demand is actually an existing debt or demand, is to exclude from such remedy contracts upon which the liability of the defendant is still contingent: *Id.*

BILLS AND NOTES.

Consideration—Surrender of old Note—Surety—Ignorance of Law.—The surrender of an old promissory note is a sufficient consideration for a new one executed by a surety, although the surety had been released from payment of the old note by the action of the insolvent principal, where both parties knew the substantial facts, but, being ignorant of the law, in good faith supposed the surety was liable for the old note: *Churchill v. Bradley*, 58 Vt.

COMMON CARRIER. See *Constitutional Law*.

CONSTITUTIONAL LAW.

Intoxicating Liquor—Screen Law.—A law requiring liquor dealers to remove obstructions to a clear view of their premises through the window on Sunday is constitutional, although it does not define what constitutes an obstruction: *State v. Boyle*, 15 R. I.

Statute authorizing seizure of Liquor.—A statute, which authorizes the seizure of intoxicating liquor, intended for unlawful use, in the possession of an express company, does not interfere with interstate commerce, and is not in conflict with sect. 8 of the Federal Constitution: *State v. O'Neil*, 58 Vt.

Railroads—Statute prohibiting Discrimination—Consolidation—Effect of.—The provisions of Pub. Stat. R. I., cap. 189, which forbid discriminations by a common carrier in his charges for transportation, apply to contracts made in this state for transportation to points beyond the state: *Providence Coal Co. v. Prov. & Wor. Rd.*, 15 R. I.

These provisions so applying are not in conflict with the clause of the Constitution of the United States, art. I., sect. 8, "Congress shall have power * * * to regulate commerce * * * with foreign nations and among the several states:" *Id.*

When a railroad is built by corporations located in and chartered by different states, and these corporations consolidate, they make but one corporation, whose acts and neglects are done by it as a whole: *Id.*

CONTRACT. See *Deed*.

Acceptance by Telegram—Place where completed.—An offer made in Boston, Massachusetts, and to stand until the next day, was accepted by telegram from Providence, Rhode Island. The receipt of the telegram was admitted. *Held*, that the contract was completed in Rhode Island, though to be performed in Massachusetts: *Perry v. Mount Hope Iron Co.*, 15 R. I.

Use of Fences for Advertisement—Construction.—A contract made by the lessees of a tract of land used for a trotting park or race course, giving the other party thereto the right to use the fences and all the buildings erected or to be erected upon the tract, except the club house, for advertising purposes, for a period of years, confers the right to use the inside as well as the outside of the main fence and the buildings inside the enclosure, except the club house: *Willoughby v. Lawrence*, 116 Ill.

The right to so make use of the fences and buildings, involves and includes the right of entry upon the premises to reach the buildings and the inner surface of the fence, and such latter right, if not an easement, is a burden or servitude in the nature of an easement: *Id.*

And the right of ingress and egress so conferred is more than a mere revocable license. Such right amounts to an interest in the premises in the nature of a right of way in gross, which a court of equity will regard as, at least, an equitable charge or burden thereon in favor of the grantee: *Id.*

Waiver of Time—Building House—Damages.—The plaintiff entered into a contract to build a house for the defendant by a time certain for \$2250, of which \$500 were to be paid in advance, and the balance was to be raised by mortgage on the house, which was to be negotiated by the plaintiff. The plaintiff failed both to negotiate the mortgage for the full amount, and to complete the house by the time agreed on, but was allowed to continue the work nearly two months afterwards, when the defendant took exclusive possession and finished it: *Held* (1), that the defendant waived the materiality of time; (2) that by stopping the plaintiff she virtually refused to permit him to raise the money by mortgage; (3) that the defendant cannot complain of the rule adopted by the court below as to damages, namely, that the plaintiff could recover what his labor and materials were worth to the defendant; because, first, she admitted, if liable, that this was the correct rule; and, second, no exception was taken to the charge as to damages: *Foster v. Worthington*, 58 Vt.

CORPORATION. See *Constitutional Law*; *Will*.

Subscription—Secret Agreement favoring the particular Subscriber—Condition not performed.—A secret agreement made with a subscriber to the stock of a railway corporation, who subscribes with others, that he shall pay only a part of his subscription, is fraudulent as to the other subscribers, and void, and his subscription will be valid and binding for the whole amount thereof: *Galena and Southern Wis. Rd. v. Ennor*, 116 Ill.

A subscription to a railway company to take a certain number of its mortgage bonds, containing a clause that it is not to be binding unless one hundred of such bonds are subscribed for, is not binding until one hundred of the bonds are so subscribed: *Id.*

And a subscription to be paid on demand being made at any time after the company's road should be graded to a point within five miles of a village named, the same to be in force only until September 20th 1879, after that date, without performance of the condition, is an invalid subscription and cannot be enforced: *Id.*

Liability of Stockholders—Contribution.—A statute provided that members of every incorporated manufacturing company should be liable

for all debts of the corporation until the whole capital stock was paid in and certain certificates filed. *Held*, that the liability extended to all persons who were stockholders when the debt was contracted, and also to all persons who were stockholders when the liability was enforced by legal process, but not to persons becoming stockholders after the debt was contracted and ceasing to be stockholders before the liability was enforced: *Sayles v. Bates*, 15 R. I.

Another statute gave to a stockholder paying such debt of the corporation an action for contribution against the stockholders "originally liable" with him for the debt. *Held*, that all persons who were stockholders when the debt was contracted, and also all persons who were stockholders when the liability for the debt was enforced, could be made to contribute: *Id.*

Trustees holding stock in trust are liable to contribute from the trust funds in their hands: *Id.*

Married women are also liable to contribute, the liability being statutory and incident to the ownership of stock: *Id.*

CRIMINAL LAW. See *Sale*.

Agent—Violation of Sabbath.—That A. employs B. in a legal business during the week does not of itself make A. liable for B.'s illegal acts on Sunday: *State v. Burke*, 15 R. I.

Larceny—Indictment—Description of Property.—In an indictment for larceny, the articles may be described by the name by which they are generally known or called in the community and among the people, and the evidence must substantially correspond with the description in the indictment: *Glover v. State*, 21 or 22 Fla.

The defendant was indicted for the larceny of a gold watch. On the trial a practical jeweller and watchmaker, after carefully examining the watch, testified that it was not a gold watch; that there were thin plates of gold on the outside and inside of the outside cases and filled with some baser metal. It is called a filled case. It is not known as a gold watch by the trade, but is known by the people generally as a gold watch. All the witnesses spoke of it as a gold watch, and it had every appearance of being gold: *Held*, that this was no variance between the allegation in the indictment and the proof: *Id.*

DAMAGES. See *Contract*.

DEED. See *Estoppel*.

Acknowledgment—Whether essential.—A conveyance of land after delivery is valid and binding on the grantors without any acknowledgment. The purpose of a certificate of acknowledgment is to prove the execution of the deed, and when its execution is otherwise proved, it is as binding as if properly acknowledged: *Robinson v. Robinson*, 116 Ill.

EASEMENT. See *Contract*.

EQUITY.

Territorial Jurisdiction—Creditor's Bill.—Where a court of equity attempts to act directly upon property, whether real or personal, by its decree, it is, in the absence of statutory regulation, essential to the power

of the court to act, that the property to be affected be within the territorial jurisdiction of the court: *Johnson v. Gibson*, 116 Ill.

But where one claims to be the owner of land or other property situate in a foreign jurisdiction, which in equity and good conscience belongs to another, the latter may sue him in equity in any jurisdiction in which he may be found, and compel him to convey the property. In such case the decree operates on the person of the defendant, and does not directly affect the property itself: *Id.*

A creditor may maintain a bill to set aside a fraudulent conveyance of his debtor in any jurisdiction where the debtor and fraudulent vendee may be found. In such case the court does not act upon the land itself, but simply declares the conveyance void, and removes the same as an obstruction to the creditor's legal remedy: *Id.*

ERRORS AND APPEALS.

Payment of Execution.—A defendant in execution delivered to the sheriff an amount of money sufficient to satisfy it, upon agreement with the sheriff that it should be returned if a supersedeas to the judgment was obtained by a certain time, and if not the amount should be applied to the full satisfaction of the execution. No supersedeas having been obtained within the time stated, the sheriff paid over to the attorneys of the plaintiff in execution in satisfaction thereof a sufficient sum to cover the amount thereof, interest and costs: *Held*, that the defendant in execution did not waive his right to prosecute a writ of error to the judgment, upon which such execution was issued: *Burrows v. Michler*, 21 or 22 Fla.

EVIDENCE.

Declarations.—Evidence of a declaration of a son of one of the parties, made in the presence and hearing of his father, who remained silent, was admitted against objections, and the jury were instructed that it was for them to determine what significance they would attach to it: *Held*, no error: *Johnson v. Day*, 78 Me.

Opinion of Witness.—In an action to recover for injuries that occurred to one travelling on the highway, whose horse ran, and the bits attached to the harness broke, and it became important to determine what effect the breaking of the bits had as to the accident; *Held*, (a) that the testimony of a witness was not admissible to prove that bits in a horse's mouth could be broken by pulling on the reins; (b) or that the witness had had bits broken in a way similar to that the plaintiff claimed his were broken: *Carpenter v. Town of Corinth*, 58 Vt.

EXECUTION.

Capias against Body—Fraud—Refusal to apply Patent Right to Debt.—The Statutes of Rhode Island provide that execution may issue against the body of a defendant whenever it shall be made to appear to the court which rendered the judgment or to any justice thereof that the "defendant has been guilty of fraud" * * * "in the concealment, detention or disposition of his property." *Held*, that such an execution properly issues without notice to the defendant. *Held*, further, that such an execution properly issues when the defendant owns a patent

right which he refuses to apply to the payment of the judgment against him: *Petition of Keene*, 15 R. I.

FRAUD. See *Insurance*.

INSURANCE.

Marine Insurance—Premium—Continuation Clause—Over Insurance.—An action may be maintained for the *pro rata* premium under the continuation clause of a marine insurance policy, when the vessel was at sea at the expiration of the term of insurance, though a previous action had been brought on the premium note and judgment therefor had been rendered in such action: *Ins. Co. of North America v. Rogers*, 78 Me.

In an action for the premium due upon a marine insurance policy, which was in the name of a part owner for the benefit of whom it may concern, the defendant presented evidence of other insurance, which made an over insurance upon his part of the vessel, and claimed to be liable, if at all, for only a ratable proportion of the premium. *Held*, that if this proposition is sound in law, the burden is on the defendant to show that the policies were simultaneous, and not intended to cover the interests of other owners: *Id.*

Acts of Agent—Estoppel—Fraud.—The plaintiff signed an application for insurance, which was written by B., "an insurance broker," in the office of the defendant's agent. The defendant returned the application to its agent for further information as to the occupancy and ownership of the property insured. The agent handed it to B., requesting him "to go and get the reply." B. took it, saw the assured, and, although he learned from him that he was only a conditional vendee in possession of the personal property, and the vendor, the tenant of the store in which it was situated, wrote in it that the assured was both the owner and tenant. B. was neither appointed nor recognised as agent by the company, or by his agent: *Held*, that the writing of the false statements, in legal significance, was the act of the agent; that the knowledge of B. was the knowledge of the company, and that it was estopped from claiming a forfeiture; that the defendant could not avoid its responsibilities by repudiating the acts of its agent, though done in part by a person employed by him: *Mullin v. Vt. Mutual Fire Ins. Co.*, 58 Vt.

It was the plaintiff's duty to supply the defendant with a truthful inventory; and, while in completing his proofs of loss, he could properly employ his wife to make an inventory of household effects destroyed, but when he made affidavit to such an inventory without scrutiny and without knowing whether it was correct, and the inventory contained many false statements calculated and intended to work a fraud, he thereby made the fraud his own. And it was error for the court, on request, to refuse to thus charge the jury, and to put it on the theory of honest intention, as: "Did he intentionally present a sworn statement of loss that was false," &c.: *Id.*

INTOXICATING LIQUORS. See *Constitutional Law*; *Sale*.

LIMITATIONS, STATUTE OF.

Acknowledgment of Stranger.—The acknowledgment of a debt, when the acknowledgment is made to a stranger and not meant to be commu-

nicated to the creditor, will not remove the bar of the statute of limitations. *Parker v. Remington*, 15 R. I.

Bail Bond—Successive Breaches.—Two breaches were made of a bail bond. The creditor plaintiff brought an action of debt, alleging the second breach: *Held*, that the statute of limitations against an action on the bond began to run at the time of the first breach, whether the creditor did or did not know of such breach, there being no fraud nor concealment to prevent the creditor obtaining knowledge of the breach: *Pearce v. Curran*, 15 R. I.

MASTER AND SERVANT.

Fellow Servant—Overseer.—A city is not liable for an injury to a laborer employed in constructing a sewer, when caused by the carelessness of one who had the oversight and direction of the work: *Conley v. City of Portland*, 78 Me.

MORTGAGE.

Life Support—Assignment.—A mortgage to secure an agreement to support another during life is assignable; and the condition may be performed by an assignee, unless the support is required by the mortgage to be furnished personally: *Ottaquechee Sav. Bank v. Holt*, 58 Vt.

And if assigned, the amount agreed upon in good faith between the assignee and the mortgagor to be paid for the support, is the sum to be paid by a subsequent mortgagee on redemption, and not what a master found was the actual cost of supporting, although the agreement was made after the second mortgage was given, the subsequent mortgagee taking its mortgage with knowledge that there was a controversy over what was to be paid on the first mortgage: *Id.*

NEGLIGENCE. See *Telegraph*.

Contributory Negligence—Burden of Proof.—It is settled law in this state that, in an action against a town to recover damages for the death of a person, alleged to have been caused by the negligence of the town in not keeping one of its ways in repair, the burden of proof is upon the plaintiff to show due care on the part of the deceased: *Merrill v. Inhabitants of North Yarmouth*, 78 Me.

A person undertook to drive with a horse and pung over a road, across which was flowing at the time a stream of water thirty or forty rods wide, and in some places not less than three feet deep, with a current moving at the rate of five miles an hour, and carrying upon its surface cakes of ice, some of which were twenty-five or thirty feet in diameter; at some stage of his journey, and in some way, he and his horse got out of the road and were precipitated into the deeper channel of the river below and were drowned. *Held*, that one who knowingly and unnecessarily exposes himself to such perils cannot be regarded as in the exercise of due care: *Id.*

PARENT AND CHILD. See *Evidence*; *Negligence*.

Wages of Minor.—When a minor son makes a contract for his services on his own account, and his father knows of it and makes no objection, the father cannot recover of the employer wages which he has paid to the son; and in such a case the question is not whether the son

was emancipated or not, but whether the father knew of the contract and made no objection: *Atkins v. Sherbino*, 58 Vt.

PARTNERSHIP.

Attachment of Partner's Interest.—The individual interest of a co-partner in the copartnership effects is attachable. The attachment may be made by seizure of the effects, and the attaching officer may remove them for safe keeping: *Trafford v. Hubbard*, 15 R. I.

That the defendant copartner has overdrawn his account with the copartnership does not invalidate the attachment: *Id.*

But the execution and record by the defendant copartner of a general assignment for the benefit of his creditors dissolves the attachment: *Id.*

PATENT. See *Execution*.

RAILROAD. See *Negligence*.

RECEIVER.

Appointment without Notice.—A receiver should not be appointed, except on notice to the party whose property is to be divested, except in cases of the gravest emergency, demanding the immediate interference of the court for the prevention of irreparable injury: *Moyers v. Coiner*, 21 or 22 Fla.

The rule requiring notice to defendant of an intended application for the appointment of a receiver would seem to be not a matter of discretion, but an inflexible rule, subject to the above exception: *Id.*

SALE.

When Title passes—Locality of—Whether or not the legal title to personal property passes by sale is a question of intent, to be gathered from the acts of the parties, and all the facts and circumstances of the case; thus, the respondent, a dealer in New York, shipped intoxicating liquor to parties in Vermont, by express, on a C. O. D. order, which was in effect a direction by the consignor to the express company not to deliver the liquors to the consignee except upon payment. The liquors, intended for an unlawful use, were seized, without warrant, while in the possession of the express company, and confiscated, before delivery and payment; *Held* (a), that the seizure was lawful; (b) that the contract was inchoate or executory while the goods were in transit; that payment was a condition precedent, and that there was no surrender of legal title; that the express company was the agent of the consignor, and that he was legally convicted under an indictment charging him with keeping liquors for unlawful purposes: *State v. O'Neil*, 58 Vt.

When in such case the liquors have been delivered by the express company to the consignee in Vermont, and paid for, the sale is in this state, and the vendor is liable to a conviction for an illegal sale: *Id.*

Conditional Sale—Validity.—An agreement in writing to sell personal property, the title to which is reserved by the seller, until the purchase-money is paid by the buyer, is a conditional sale, and does not vest title in the buyer until the performance of the condition, to wit: the payment of the purchase-money, notwithstanding that at the time

of making said agreement, possession of the property is delivered by the seller to the purchaser : *Campbell Printing Press Co. v. Walker*, 21 or 22 Fla.

Such an agreement is valid, as against subsequent creditors and *bona fide* purchasers for valuable consideration, without notice : *Id.*

SET-OFF.

In Equity.—It is not essential to the proper allowance of a legal demand as a set-off in equity against a judgment at law, on the ground of the insolvency of the party in whose favor the judgment was recovered, that the insolvency should have occurred subsequent to the judgment. The set-off may be allowed irrespective of the time of the occurrence of the insolvency, whether before or subsequent to the judgment : *G. & S. W. Rd. v. Ennor*, 116 Ill.

And although the cross-demand in such case might have been set off in the action at law in which the judgment was recovered, that was permissive, but not compulsory on the defendant : *Id.*

SUNDAY. See *Criminal Law*.

TELEGRAPH. See *Contract*.

Negligent Transmission—Liability of Company—Cipher Message.—When a telegram is delivered to an operator, employed by a telegraph company for transmission and delivery to the person to whom it is addressed, and the consideration for said service is paid to and accepted by such operator, the law enjoins on such company prompt and skilful performance of their undertaking : *Western Un. Tel. Co. v. Hyer*, 21 or 22 Fla.

If a telegraph company, to whom a telegram has been delivered, as above, fail to transmit or to deliver the same to the person to whom it is addressed, within a reasonable time, such company is responsible for such failure, to the person injured, whether he be the sender or the person indicated in such telegram as the one to whom it was to be sent, for such damages as are proximate and reasonable, and naturally result from such failure : *Id.*

It is no defence for said company, when sued for failure to transmit and deliver a telegram, as above, that the sender did not inform them or the operator of its importance, when they fail to show that if they or their operator had have received such information, it would in any respect have changed the method of its transmission, or the time in which it was to be sent, the agency employed, the price demanded therefor, or the degree of skill used in its transmission : *Id.*

Nor is it any defence to said company that such message is in cipher or words, the meaning of which the operator does not know ; provided, such message is plainly written and the words therein are in the letters of the English alphabet : *Id.*

TRADE MARK.

Character of—Infringement—Protection afforded in Equity.—The words "health-preserving," preceding the word "corset," in the name adopted by the manufacturer of corsets, made under letters patent, but describe

a quality of the corset, or the effect which its use will produce, and can not therefore, be employed as a trade mark: *Bull v. Siegel*, 116 Ill.

It is well settled that directions, advertisements, notices, &c., constitute no part of a trade mark, and also, that no one can obtain a trade mark in the form, appearance or finish of his goods, so that another may not lawfully make his goods like them, nor can there be a trade mark in the form or color of a package or box: *Id.*

Even if a party has a trade mark in the name of "Balls" and picture and words and form of lettering on the labels pasted on his boxes, containing corsets, there is no infringement of the same when a different name is used by another manufacturer, with a picture, words and form of lettering on the labels pasted on his boxes so totally unlike those of the former, as that no one can reasonably mistake the one for the other: *Id.*

As a general rule, exact similitude is not required to constitute an infringement of a trade mark, or to entitle the complaining party to protection; but if the words of the alleged infringing device, are such as would be likely to mislead persons in the ordinary course of purchasing the goods, and induce them to suppose they were purchasing the same article, then the similitude is such as entitles the injured party to equitable protection, if he takes reasonable measures to assert his rights and prevent their continued invasion: *Id.*

But a court of equity is not bound to interfere, when ordinary attention will enable purchasers to discriminate between the trade marks used by different parties: *Id.*

VENDOR AND VENDEE.

Vendor's Lien—Principle on which Lien rests—Waiver.—The principle governing courts of equity in the enforcement of liens, is the implied agreement held to exist between the vendor and vendee that the former shall hold a lien on the lands sold, for the payment of the purchase price, on the ground that the person who has the estate ought not, in conscience, as between them, to keep it and not pay the purchase-money: *Beal v. Harrington*, 116 Ill.

If a vendor of real estate takes collateral and independent security for the purchase-money, he thereby releases and waives all right to a vendor's lien: *Id.*

A person purchased a tract of land for himself, for which he agreed to pay by a stock of goods valued at \$4000, and the conveyance of town lots valued at \$1000, and had the land so purchased by him conveyed to his two sons in trust for himself, they paying nothing, and delivered the goods, but was unable to convey the lots for want of title thereto. The sons afterward, at the father's request, conveyed the land to a third person, who paid nothing therefor, but held the title for the father: *Held*, that the vendor of the land had a vendor's lien upon the lands conveyed by him, to the extent of \$1000, the amount of the unpaid purchase-money, which he might enforce as against the sons and their voluntary grantee: *Id.*

WILL.

Legacy—Accord and Satisfaction—Interest.—Legacies, unless otherwise controlled by the will, draw interest after one year from the probate

of the will; and the rule is not affected by the fact that the executor is unable to gather in the assets and pay the legacy within the year: *Vermont State Baptist Convention v. Ladd*, 58 Vt.

When there is a dispute between an executor and a legatee as to the amount of interest due on a legacy, on account of the expense and delay caused by a long litigation carried on for the protection of the estate, an acceptance by the legatee of a sum less than the one due on the legacy is an accord and satisfaction, if the payment is made upon the express condition that it shall be in full for the balance due, and the money is accepted without protest against such condition: *Id.*

Devise—Charity—Corporation.—A devise of real and personal property generally, without stating the purpose, to a corporation created and existing for educational purposes alone, must be regarded as a devise for educational purposes: *Female Academy v. Sullivan*, 116 Ill.

A corporation for educational purposes, as, an academy, is not one for "pecuniary profit," merely because fees are charged for tuition. A corporation for pecuniary profit is one organized "for the pecuniary profit of its stockholders or members:" *Id.*

Devise—Life-Estate—Residuary Devisee.—When a party is the devisee of the interest in real estate specifically devised as a life-estate, that fact will not preclude such party from taking the remaining interest in the estate in the character of a residuary devisee: *Davis v. Callahan*, 78 Me.

By one clause of a will the testator devised unto his wife, for and during the term of her natural life, certain real estate. The reversionary interest therein was not specifically devised. By the general residuary clause he devised unto his wife all the rest, residue and remainder of his estate, real, personal and mixed, wherever found and however situate. *Held*, that by the terms of the will and the intention of the testator as gathered from the whole instrument, the wife took an estate in fee in the real estate thus devised: *Id.*

Deficiency of Assets—Annuities—Legacies.—When the possibility of a failure of sufficient assets to meet the legacies named by a testator in his will, has not been anticipated and specifically provided for by him, the presumption of intended equality prevails between general legatees, as well as equality in respect to the share to be borne in all deficiencies of assets: *Emery v. Batchelder*, 78 Me.

In the administration of testamentary assets where there is a deficiency of such assets after the payment of debts, expenses and specific legacies the loss is to be borne pro rata by those pecuniary legacies which are in their nature general: *Id.*

Annuities stand upon the same footing as legacies: *Id.*

Between annuitants and legatees there is no priority merely because one is an annuitant and the other a legatee, where the estate is deficient, but both must abate proportionally: *Id.*

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THE CONSTITUTIONAL OBJECTIONS TO RETROSPECTIVE AND EX POST FACTO LAWS.

I. *Under the Constitution of the United States.*—All *ex post facto* laws are necessarily retrospective in their operation ; but not all retrospective legislation is *ex post facto* in the sense in which the latter term is used in the phraseology of constitutional law. Retrospective legislation is an expression sufficiently comprehensive to include all statutes, whether civil or criminal, which operate upon antecedent transactions, rights or remedies. *Ex post facto*, on the other hand, is a technical term applying solely to crimes and their punishments. It is thus defined by Mr. Justice STORY : " It has been solemnly settled by this court that the phrase, *ex post facto* laws, is not applicable to civil laws, but to penal and criminal laws which punish a party for acts antecedently done which were not punishable at all, or not punishable to the extent or in the manner prescribed. In short, *ex post facto* laws relate to penal and criminal proceedings which impose punishments or forfeitures, and not to civil proceedings which affect private rights retrospectively : " *Watson v. Mercer*, 8 Pet. 110 ; *Calder v. Bull*, 3 Dall. 386 ; *Locke v. Dane*, 9 Mass. 363 ; *Grim v. School District*, 57 Penn. St. 435 ; *Bridgeport v. Hubbell*, 5 Conn. 240 ; *Baughner v. Nelson*, 9 Gill 299. Now the Constitution of the United States prohibits the several states from passing any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts. But it follows from the distinctions above taken that state enactments retroactive in their operation, even such as must necessarily divest vested rights, do not fall within the provisions of

the federal constitution, unless their effect is to impair the obligation of contracts, or unless they partake of the character of *ex post facto* laws. And this is the unanimous voice of the decisions: *Satterlee v. Matthewson*, 2 Pet. 380; *Watson v. Mercer*, 8 Id. 110; *Charles River Bridge v. Warren Bridge*, 11 Id. 539; *Carpenter v. Pennsylvania*, 17 How. 456; *Locke v. New Orleans*, 4 Wall. 172; *Albee v. May*, 2 Paine 74; *Grim v. School District*, 57 Penn. St. 485; *Lane v. Nelson*, 79 Id. 407; *People v. Supervisors*, 63 Barb. 85; *Wilson v. Hardesty*, 1 Md. Ch. 66; *State v. Squires*, 26 Iowa 340; *Drehman v. Stifel*, 41 Mo. 184; *Reed v. Beall*, 42 Miss. 472. Except in these two cases, therefore, no objection can be taken to an act of a state legislature, under this clause of the national constitution, however injuriously it may affect private rights, or however impolitic or unjust may be its provisions. It must stand or fall according to the terms of the organic law of the particular state.

II. *Under State Constitutions.*—Although most of the state constitutions contain prohibitory clauses against this general species of legislation, yet their language, and the particularity with which the forbidden acts are described, exhibits a wide diversity. Thus the North Carolina Constitution of 1876 inhibits "*ex post facto* laws." Those of Massachusetts and Maryland are directed against "any *ex post facto* law or bill of attainder." In Alabama, Illinois, Indiana, Kentucky, Mississippi, Oregon, Pennsylvania and Rhode Island (the constitution last adopted being in each case intended), it is provided that "no *ex post facto* law nor any law impairing the obligation of contracts shall be passed." A still more comprehensive expression—"no bill of attainder, *ex post facto* law, or law impairing the obligation of contracts shall ever be passed"—is incorporated in the constitutions of Arkansas, California, Florida, Iowa, Maine, Michigan, Minnesota, Nebraska, Nevada, South Carolina, Virginia, West Virginia and Wisconsin. In the states of Colorado, Missouri, Tennessee and Texas, the prohibition is against *ex post facto* laws, laws impairing the obligation of contracts, and laws retrospective in their operation. In the New Hampshire Constitution of 1792, it is said: "Retrospective laws are highly injurious, oppressive and unjust. No such law, therefore, should be made, either for the decision of civil causes or the punishment of offences." In the constitution of Louisiana of 1868, the following language is held: "No *ex post facto* or retroactive law, nor any

law impairing the obligation of contracts, shall be passed, nor vested rights be divested, unless for purposes of public utility and for adequate compensation made." In New Jersey (constitution of 1844) the clause reads, "The legislature shall not pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or depriving a party of any remedy for enforcing a contract which existed when the contract was made." And in Ohio (constitution of 1851, art. II., § 28), it is provided that "the general assembly shall have no power to pass [retrospective laws], but may, by general laws, authorize the courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties and officers, by curing omissions, defects and errors in instruments and proceedings, arising out of their want of conformity with the laws of this state." From this it will be seen that while *ex post facto* laws are expressly prohibited in thirty-one states (in addition to the controlling force of the federal constitution), *retrospective* legislation, as such, is in terms forbidden in only seven.

III. *Substantive Harmony of the Decisions.*—Notwithstanding this lack of uniformity in the constitutional provisions of the several states, there seems to be good ground for the hope that an ultimate harmony both in theory and practice will be reached, and both on the part of legislatures and courts. For, in the first place, all theories on this subject start with the postulate that the legislature of an individual state may enact *any* law, of any character or on any subject, unless it is prohibited, either in express terms or by necessary implication, in the Constitution of the United States or of that state. Yet in those states where retrospective legislation is *not* expressly forbidden, the courts have frequently refused to give their sanction to such statutes when they were palpably unjust, or impaired vested rights, or destroyed remedies, basing their authority to declare the acts unconstitutional on the ground that they were contrary either to the spirit of the constitution and the implications necessarily drawn from it, or to those cardinal principles of the social compact which antedate all laws and enter into the very framework of all representative government. Thus in Connecticut, while there is nothing in the constitution of that state to prohibit retrospective legislation, Judge BUTLER has said: "But the power of the legislature in this respect is not unlimited. They cannot entirely disregard the fundamental principles of the social contract. Those principles underlie all legislation, irrespective of constitu-

tional restraints, and if the act in question is a clear violation of them, it is our duty to hold it abortive and void. * * * Although it is to be assumed that the legislature supposed they had authority to pass the particular retrospective act, and judged it to be reasonable and just, yet they may have erred; and if it is shown to the court, with entire clearness and certainty, to be so unreasonable and unjust in its operation upon antecedent legal rights that the action of the legislature cannot be vindicated by any reasonable intentment or allowable presumption, it is our duty to declare it void:"

Welch v. Wadsworth, 30 Conn. 149. And a careful reading of the leading case of *Calder v. Bull*, 3 Dall. 386, will show that the judges entertained practically the same views as above expressed, though their decision was concerned with other principles. And see, in general, *Kendall v. Dodge*, 3 Vt. 360; *Ham v. McClaws*, 1 Bay 93; *Coosa River Steamboat Co. v. Barclay*, 30 Ala. 120; *Clarke v. McCreary*, 12 Sm. & Mar. 347. It must be confessed, however, that a contrary doctrine is strongly maintained in Pennsylvania. BLACK, C. J., says: "We are urged, however, to go further than this, and to hold that a law, though not prohibited, is void if it violates the spirit of our institutions, or impairs any of those rights which it is the object of a free government to protect, and to declare it unconstitutional if it be wrong and unjust. But we cannot do this:" *Sharpless v. Mayor*, 21 Penn. St. 161; *Weister v. Hade*, 52 Id. 474. Now, on the other hand, in those states where retrospective legislation is expressly and in terms forbidden, the courts have nevertheless held that statutes which are of a wholesome and salutary effect, such as confirm and strengthen vested rights instead of abridging them, or operate only upon remedies, and are not in hostility to natural justice and the guarantees of the social compact, although explicitly invested with a retrospective effect, are neither concerned with the mischiefs intended to be guarded against by that prohibition, nor properly to be regarded as within its spirit. This proposition is amply supported by the following cases: *Rich v. Flanders*, 39 N. H. 304; *Rairden v. Holden*, 15 Ohio St. 207; *New Orleans v. Poutz*, 14 La. Ann. 853; *De Cordova v. Galveston*, 4 Tex. 470; *Paschal v. Perez*, 7 Id. 348. In reality, therefore, these different doctrines amount to no more than a contemplation of the same rule from two different points of view. The one side regards the *obverse* of a great principle of legislation, the other the *reverse*; but the principle is the same—that

no injustice must be done by a retrospective statute and no vested rights invaded.

IV. *The Rule of Construction.*—There is, nevertheless, a strong latent sentiment against retrospective legislation, probably in consequence of the injustice and oppression to which it *might* give rise if allowed to affect antecedently acquired rights or destroy the obligation of existing contracts. Witness the constitution of New Hampshire, where it is stigmatized as “highly injurious, oppressive, and unjust;” and the case of *Underwood v. Lilly*, 10 S. & R. 101, where it is said, “retrospective laws being in their nature odious, it ought never to be presumed the legislature intended to pass them, where the words will admit of any other meaning.” Hence the rule is inflexible that a statute will not be so construed as to have a retrospective operation, unless the intention of the legislature to give it that effect is expressed in terms too clear and explicit to admit of a reasonable doubt: *State v. Hays*, 52 Mo. 578; *State v. Ferguson*, 62 Id. 77; *People v. Supervisors*, 63 Barb. 85; *Wade v. Strack*, 1 Hun 96; *Thompson v. Alexander*, 11 Ill. 54; *Garrett v. Beaumont*, 24 Miss. 377; *Thorne v. San Francisco*, 4 Cal. 127; *Brigge v. Hubbard*, 19 Vt. 86; *Gault's Appeal*, 33 Penn. St. 94; *Plumb v. Sawyer*, 21 Conn. 351; *Baldwin v. Newark*, 38 N. J. L. 158; *Vreeland v. Bramhall*, 39 Id. 1. And even where admitted to retrospective operation, the statute will be subjected to the most circumscribing construction possible, consistent with the intention of the legislature: *Hedger v. Rennaker*, 3 Met. (Ky.) 255.

V. *Statutes not to impair Vested Rights.*—The legislature of a state cannot take away vested rights by giving to a statute a retrospective operation: *Houston v. Bogle*, 10 Ired. 496. And since the impairment of vested rights is frequently made the test of the constitutionality of a retrospective statute, it becomes important to determine what interests are properly to be included in that phrase. And in the first place, a statute is not objectionable as retrospective because it purports to operate on prior contingent or qualified rights: *Clarke v. McCreary*, 12 Sm. & Mar. 347. Thus an act giving to property owners in a certain city two years to redeem from sales for municipal claims may apply to cases of sales made before its passage, but in which no deeds had been executed to the purchasers: *Gault's Appeal*, 33 Penn. St. 94. So the repeal of a statute giving a right of action for a penalty in certain cases, will purge all past transac-

tions of their penal character under that statute, but saving all vested rights to the penalty; however, when the act gave the penalty to any one of a class named who should first sue for it, there is no vested right in any one until suit brought, even if there is before judgment: *Lakeman v. Moore*, 32 N. H. 413. But where the statute gives the penalty to an individual, his right cannot be taken away although no proceedings for its recovery have been commenced at the time of the repeal: *Dow v. Norris*, 4 N. H. 16; *per contra*, *West Troy Fire Dep't. v. Ogden*, 59 How. Pr. 21. And a right to a three-fold forfeiture of all the interest reserved on a contract, on account of usury, is not a vested right which the legislature cannot take away: *Parmelee v. Lawrence*, 44 Ill. 405. So a right to recover damages in an action of forcible entry and detainer is not a vested right of property: *Drehman v. Stifel*, 41 Mo. 184. And a statute making joint heirs tenants in common applies to estates existing at its passage: *Stevenson v. Cofferin*, 20 N. H. 150. On the other hand, where the law stood thus—that a party who failed to take out a writ of error until an adjudication had been made by the appellate court on his adversary's writ of error, waived or lost his right to do so, it was held that a subsequent statute giving the right to any litigant to take out a writ of error after an adjudication upon a former one taken by the opposite party in the same case, could not apply to a case already determined on one writ of error, because it would impair the vested right of the successful party to rely upon the conclusiveness of the judgment: *McCabe v. Emerson*, 18 Penn. St. 111. So an act of the legislature awarding a new trial in an action which has been already determined in a court of law, is an exercise of judicial power, and also disturbs a vested right, and for these two reasons is unconstitutional: *Merrill v. Sherburne*, 1 N. H. 199. But a statute which takes away the right to a future appeal in an action pending and undetermined when the statute takes effect is not unconstitutional, for the right of appeal is not yet vested while the cause remains open: *Grover v. Coon*, 1 N. Y. 536.

VI. *Statutes Valid if affecting the Remedy alone.*—A law which applies solely to the remedy may be allowed a retroactive effect. A distinction is to be taken between vested rights and the remedies provided for their protection and enforcement. Parties have a vested right to a remedy, but not to any particular one in such sense that the legislature cannot change it: *Lockett v. Usry*, 28 Ga. 345.

Hence the legislature has authority under the constitution to take away a particular form of remedy by a retrospective statute, filling its place with one substantially as good: *People v. Supervisors*, 70 N. Y. 228; *United States v. Sampersyac*, 1 Hempst. 118; *Hinton v. Hinton*, Phill. (N. C.) 410. So "the legislature, provided it does not violate the constitutional prohibitions, may pass retrospective laws, such as in their operation may affect suits pending, and give to a party a remedy which he did not previously possess, or modify an existing remedy, or remove an impediment in the way of recovering redress by legal proceedings:" *Hepburn v. Curtis*, 7 Watts 300; *Searcy v. Stubbs*, 12 Ga. 437. So a retrospective statute which makes a mere debt a lien on the debtor's realty is constitutional, as affecting the remedy merely; but not where a purchaser of the property has paid a valuable consideration for the property sought to be subjected to the lien, before the passage of the act: *Bolton v. Johns*, 5 Penn. St. 145. Again, a statute which extends the time and releases the conditions prescribed in a former statute in regard to the issuing of executions, may apply to judgments recovered before the passage of the act without being liable to the objection of affecting vested rights: *Henschall v. Schmidt*, 50 Mo. 454.

VII. *Curative and Confirmatory Acts*.—These are the most common examples of retrospective laws; and they are generally held constitutional in so far as they operate merely to validate or strengthen previously acquired rights. But they are nevertheless to be subjected to a rigid scrutiny, lest the confirmation of a previously defective interest or title should have the effect to impair intervening and established rights. For example, an act validating defective acknowledgments of deeds may be allowed a retrospective operation, because it is supposed not to affect the deed itself, but only the mode of proof: *Journey v. Gibson*, 56 Penn. St. 57; *Barnet v. Barnet*, 15 S. & R. 72. So the legislature has the constitutional power to declare deeds valid which are defective through the failure of a notary to affix his seal to the acknowledgment: *Maxey v. Wise*, 25 Ind. 1. But an act declaring the acknowledgment of all recorded deeds within the state to be valid, whether acknowledged in compliance with previously existing laws or not, will be unconstitutional in so far as it impairs vested rights: *Brinton v. SeEVERS*, 12 Iowa 389; and see *Good v. Zercher*, 12 Ohio 864. So where the mode in which a wife can relinquish dower has

been prescribed by statute, the legislature cannot declare in a subsequent act that deeds executed in a certain way previously to its passage, but not following the provisions of the former law, shall operate to deprive a wife of her dower; she has a vested right therein which the legislature is incompetent to deprive her of: *Russell v. Rumsey*, 35 Ill. 362; and see *Routson v. Wolf*, 35 Mo. 174. And the legislature cannot constitutionally confirm a patent or survey of land which was absolutely void, so as to divest a title legally acquired before the attempted confirmation: *Sherwood v. Fleming*, 25 Tex. Sup. 408. Again, the legislature has constitutional authority to pass a law affecting the execution of wills and to give it a retrospective effect upon all wills already made but which have not yet taken effect by the death of the testator; because no interests are vested or fixed under a will until the testator's decease: *Baptist Union v. Peck*, 10 Mich. 341; *Loveren v. Lamprey*, 22 N. H. 434. But it is not competent to the legislature to validate a will which, at the time of its execution, was void for want of signature, where the testator has died before the passage of the validating act: *McCarty v. Hoffman*, 23 Penn. St. 507; *Greenough v. Greenough*, 11 Id. 489. And a retrospective law cannot operate to make anything devisable which could not be devised previously: *Southard v. Rd.*, 26 N. J. L. 13. An Act of Assembly validating a city ordinance, for the grading and paving of certain streets, which had become null and void for want of due record, is not unconstitutional because it provides that the omission to record shall not affect or impair the lien of the assessments against the lot-owners: *Schenley v. Com.*, 36 Penn. St. 29. And an act validating certain usurious contracts previously made and which, under the statute against usury, were void in part, is not unconstitutional: *Savings Bank v. Allen*, 28 Conn. 97. So an act confirming the levies of executions in certain cases, where they were previously defective, is valid: *Mather v. Chapman*, 6 Conn. 54. And whereas it is sometimes suggested that the rule which renders it impossible for an individual to confirm that which was a mere nullity should apply also to legislative bodies, the court in Connecticut say: "Although individuals may not have power to make good *ab initio* that which was originally void, by subsequent deeds or acts of confirmation, yet this cannot be true of acts of sovereignty—acts of legislation not conflicting with constitutional rights:" *Bridgeport v. Rd.*, 15 Conn. 495.

VIII. *Statutes Expository of Prior Acts.*—The rule generally prevails that the legislature has power, by the enactment of a new statute, to declare and settle the construction of an old one, and such enactment will apply at least to all such existing cases as have not already passed to judgment: *Dash v. Van Kleeck*, 7 Johns. 477. A legislative exposition of a doubtful law is possibly the exercise of a judicial power, but if it interferes with no vested rights, impairs the obligation of no contract, and is not in conflict with the primary principles of the social compact, it is in itself harmless, and may be admitted to retroactive efficiency; but if rights have grown up under a law of somewhat ambiguous meaning, then it cannot interfere with them, for the construction of the old law belongs to the courts: *McLeod v. Burroughs*, 9 Ga. 213; *Baker v. Herndon*, 17 Id. 568; *McManning v. Farrar*, 46 Mo. 376. In Vermont, however, it is distinctly denied that a statute amending a prior statute by declaring that it shall read in a given manner can have any retrospective effect: *Kelsey v. Kendall*, 48 Vt. 24. This point is involved in a good deal of uncertainty and confusion, but the Supreme Court of Pennsylvania seems to have given expression to the most reasonable views, in the following language: "A state or any other party to a grant, may certainly consent, at any time after its execution, that it shall be interpreted differently from its expression; but there seems to be no reasonable principle on which expository statutes can be founded beyond this, except by regarding them as creative of a new law, and not as interpreting an old one. Law, in its proper sense, is a rule of *future* conduct, and not a test of conduct that precedes it. Legislation and interpretation are naturally and radically distinct functions. Every man must, in the first instance, interpret the law for himself in endeavoring to obey it. It becomes matter of official interpretation only when a case arises in which it is alleged to have been violated; and then, of necessity, the courts must ascertain the interpretation, not according to the terms of any *post facto* expository statute, but according to the terms of the law, as it stood when the act was done. In the very nature of things interpretation follows legislation, and is not to be confounded with it, either as an act or as an authority. The duties are as distinct as possible, and the performance of them is given to different offices; yet without preventing the legislature from embodying in a statute rules for its interpretation, or from making a new law, by changing the application or interpretation of

an old one relative to future cases:" *West Branch Co. v. Dodge*, 31 Penn. St. 288.

IX. *Statutes affecting Judicial Proceedings.*—A person whose property has been taken under the power of eminent domain has a right to maintain his action and have a trial by jury, and he cannot constitutionally be required, by retroactive legislation, to submit his claims to a tribunal not proceeding according to the course of the common law: *In re Townsend*, 39 N. Y. 171. And again, an act passed after the commencement of an action, which changes the mode of procedure, can have no application to such cause, and the action must be tried according to the law existing at the commencement of the suit: *Merwin v. Ballard*, 66 N. C. 398. But retrospective laws changing merely the rules of evidence or the rules of practice are not within the scope of the constitutional objections. Thus an act making parties to pending suits competent witnesses on the trial thereof is not unconstitutional: *Little v. Gibson*, 39 N. H. 505. So the legislature has power to pass a statute providing that the validity of existing marriages shall not be questioned in the trial of collateral issues on account of the insanity of either party: *Goshen v. Richmond*, 4 Allen 458. And an act providing that in actions between husband and wife either shall be a competent witness in his or her behalf against the other, may apply to civil actions pending at its passage: *Southwick v. Southwick*, 49 N. H. 510. And again, a statute declaring that an uncontested probate, by the register of the proper county, of a will of realty, shall be conclusive after five years from its date, may properly apply to a will proved before its passage: *Kenyon v. Stewart*, 44 Penn. St. 179. But a statute authorizing the probate court to entertain a bill to review its own decrees, has not a retrospective effect so as to support a bill to review a decree rendered before the passage of the act: *Stewart v. Davidson*, 10 Sm. & Mar. 351. "While the legislature may not by a retroactive law render valid judicial proceedings which were utterly void for want of jurisdiction, it is equally clear that in cases where the jurisdiction has attached, and there has been a formal defect in the proceedings, where the equity of the party is complete, and all that is wanted is legal form, it is within the recognised power of the legislature to correct such defect and to provide a remedy for the legal right:" *Lane v. Nelson*, 79 Penn. St. 407.

X. *Statutes creating new Liabilities.*—While this species of legislation is not in general objectionable if it affects remedies only, yet the legislature has no constitutional power to enact retrospective laws which create personal liabilities where none before existed. A statute making members of corporations personally liable for the corporate debts is within this restriction, and can be held to operate prospectively only: *Coffin v. Rich*, 45 Me. 507. It is frequently said, however, that where a moral obligation exists, the legislature may give it legal effect by a statute retrospective in its operation: *Lycoming v. Union*, 15 Penn. St. 166; *Sedgwick Co. v. Bunker*, 16 Kans. 498. To much the same effect is the language of Mr. Justice FIELD in *New Orleans v. Clark*, 95 U. S. 654: "The constitution of Louisiana of 1868, which provides that no retroactive law shall be passed, does not forbid such legislation [as that now in question]. A law requiring a municipal corporation to pay a demand which is without legal obligation, but which is equitable and just in itself, being founded upon a valuable consideration received by the corporation, is not a retroactive law,—no more so than an appropriation act providing for the payment of a pre-existing claim. The constitutional inhibition does not apply to legislation recognising or affirming the binding obligations of the state, or of any of its subordinate agencies, with respect to past transactions. It is designed to prevent retrospective legislation injuriously affecting individuals, and thus protect vested rights from invasion."

.XI. *Statutes of Limitation.*—It is competent for the legislature to pass statutes of limitation, prescribing the time within which actions shall be brought on demands already accrued, provided the time is not so unreasonably shortened as to practically deprive parties of their remedy altogether: *Korn v. Browne*, 64 Penn. St. 55; *Fiske v. Briggs*, 6 R. I. 557; *Griffin v. McKenzie*, 7 Ga. 163; *Cox v. Berry*, 13 Id. 306; *Call v. Hagger*, 8 Mass. 480; *Holcombe v. Tracy*, 2 Minn. 241; *Maltby v. Cooper*, 1 Morris (Ia.) 59; *Pearce v. Patton*, 7 B. Mon. 162; *Billings v. Hall*, 7 Cal. 1. But where such a statute allows only thirty days for the commencement of suits on existing debts, it must be regarded as unconstitutional, because that time is unreasonably and oppressively short: *Berry v. Ransdall*, 4 Met. (Ky.) 292. And where property rights have been acquired by virtue of a limiting act, they cannot be divested by a subsequent statute enlarging the time for bringing suits: *Sprecker v. Wakeley*, 11 Wis. 432.

XII. *Marriage and Divorce*.—A law validating previous defective marriages is good and constitutional: *Goshen v. Stonington*, 4 Conn. 209. So is a statute, remedial in its nature, and intended to legitimate the issue of marriages otherwise void: *Brower v. Bowers*, 1 Abb. App. Dec. 214. But a statute prohibiting the intermarriage of a white person with an Indian, enacted after such a marriage, cannot make it void: *Illinois Co. v. Bonner*, 75 Ill. 315. Thus far the way is clear. But when we approach the subject of divorce legislation, with the inquiry whether or not it may constitutionally be allowed a retrospective operation, we are met with much confusion and embarrassment. To state the question concisely—is it competent for the legislature to authorize the courts to grant divorces for causes occurring before the passage of the authorizing statute, and which, at the time of their happening, furnished no ground for the dissolution of the marriage relation? A direct affirmative answer is given in the cases of *Carson v. Carson*, 40 Miss. 349, and *Jones v. Jones*, 2 Tenn. 2; and an equally emphatic negative in that of *Clark v. Clark*, 10 N. H. 387, where such a statute is not only regarded as clearly retrospective within the meaning of the state constitution, but is characterized as eminently deserving of the epithets therein applied to such laws—"highly injurious, oppressive and unjust." Space will not allow an extended review of the other authorities on this point; but the reader is referred to Mr. Bishop's excellent Treatise on Marriage and Divorce (vol. I., §§ 696-701), where the whole subject is discussed with much learning and candor. A few pertinent suggestions, however, may be added. In the first place, under the definitions already given, such a law is most certainly not *ex post facto*; it is in no sense penal or criminal. In the second place, it has been decided again and again that as marriage is not properly to be regarded as a contract, for judicial purposes, a statute authorizing its dissolution for prescribed causes is not open to the objection of "impairing the obligation of contracts:" *Maguire v. Maguire*, 7 Dana 183; *Adams v. Palmer*, 51 Me. 481; *Cronise v. Cronise*, 54 Penn. St. 255; *Carson v. Carson*, 40 Miss. 349; *Noel v. Ewing*, 9 Ind. 37. And again, as we have already seen (*ante* III.), the practical tendency of the constitutional learning of *all* the states is to restrict the meaning of the word "retrospective" to such statutes as are calculated to impair or divest antecedently acquired rights of property: the advocates of the theory that retroactive divorce legislation is unconstitutional

are therefore driven to the necessity of holding that the *marital status itself* is a species of property vested in each of the parties to that relation, and such that it may not lawfully be taken away by subsequent legislation. The only other ground from which this position could receive a semblance of support would be that the enactment of such a statute would amount to an assumption of judicial power on the part of the legislative body. Both these views are satisfactorily confuted by Mr. Bishop in the chapter already referred to. As to the rule of construction, his conclusion is (§ 102): "It being the primary object of the divorce suit to regulate the order of society and purify the fountains of morality, while still as between the parties it is a private controversy,—and the proceeding being in the highest degree remedial, so that the spirit and reason of the divorce statutes should be pre-eminently the guides to their interpretation,—we should, in all cases where the legislative intent is not plain in the words, prefer the construction which makes the statute applicable to past offences, the same as to future."

XIII. *Statutes adverse to the State's own Interest.*—The state has an undoubted right to pass a retrospective law impairing her own rights: *Davis v. Dawes*, 4 W. & S. 401; for when a state legislature passes a retroactive law which operates only on property belonging to such state, no private rights are infringed: *Lewis v. Turner*, 40 Ga. 416.

XIV. *More particularly of Ex Post Facto Laws.*—The term *ex post facto* received an authoritative exposition in the leading case of *Calder v. Bull*, 3 Dall. 386. The definition there given by Mr. Justice CHASE may be regarded as having settled the law for this country, inasmuch as it has been followed in numberless cases, and no court has been found to deviate from it. It is in the following language: "I will state what laws I consider *ex post facto* laws within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed. 4th. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required

at the time of the commission of the offence, in order to convict the offender." And see *Marion v. State*, 5 Crim. Law Mag. 859; *Kring v. State*, 4 Id. 550. To these should probably be added the case where the period of limitation for the prosecution of offences has been enlarged, and it is attempted to include within it an instance where a right to acquittal had been absolutely acquired by the completion of the period prescribed when the offence was committed: *Com. v. Duffy*, 96 Penn. St. 506. But it must be noted that the prohibition against *ex post facto* laws relates to crimes and their punishments and not to criminal proceedings: *In re Perry*, 3 Gratt. 632; *People v. Mortimer*, 46 Cal. 114. Thus a statute erecting a new tribunal, or giving jurisdiction to an existing court, to try past offences, is not *ex post facto*: *Com. v. Phillips*, 11 Pick. 28. Neither is a statute giving to the state a certain number of peremptory challenges of jurors, though extending to the trial of offences committed before its passage: *State v. Ryan*, 13 Minn. 370; *Walston v. Com.*, 16 B. Mon. 15.

The rule against aggravating the crime or increasing the punishment is rigorously applied. Thus a law increasing costs on conviction for an offence cannot be applied to acts committed before its passage: *Caldwell v. State*, 55 Ala. 133. Again, in the language of the head-note to *Ross's Case*, 2 Pick. 165, "an enactment that where a person has been convicted of a crime punishable by confinement to hard labor, he shall, upon conviction of another offence punishable in like manner, be sentenced to a punishment in addition to the one prescribed by law for this last offence, is not *ex post facto* when applied to a case in which the second offence was committed after the passing of the statute; *aliter*, if applied where the second offence was committed before the statute was passed." But a law which plainly reduces or mitigates the punishment for a past offence is not *ex post facto*; on the contrary it is an act of clemency, and open to no constitutional objection: *State v. Arlin*, 39 N. H. 179; *Com. v. Wyman*, 12 Cush. 237; *Hartung v. People*, 22 N. Y. 105. In the case last cited DENIO, J., says: "In my opinion, it would be perfectly competent for the legislature, by a general law, to remit any separable portion of the prescribed punishment. For instance, if the punishment were fine and imprisonment, a law which should dispense with either the fine or the imprisonment might, I think, be lawfully applied to existing offences; and so, in my opinion, the term of imprisonment might be reduced,

or the number of stripes diminished in cases punishable in that manner. Anything which, if applied to an individual sentence, would fairly fall within the idea of a remission of a part of the sentence, would not be liable to objection. And any change which should be referable to prison discipline, or penal administration, as its primary object, might also be made to take effect upon past as well as future offences, as changes in the manner or kind of employment of convicts sentenced to hard labor, the system of supervision, the means of restraint or the like. Changes of this sort might operate to increase or mitigate the severity of the punishment of the convict, but would not raise any question under the constitutional provision we are considering."

H. CAMPBELL BLACK.

Williamsport, Pa.

RECENT AMERICAN DECISIONS.

Supreme Judicial Court of Massachusetts.

TRAINER v. TRUMBULL.

A., an infant, had a father and mother living, but who did nothing for his support; he himself being in an almshouse, and in a sickly condition. B. was told by the father of A. that A. would at his (the father's) death, be worth \$10,000, and was requested by the father to care for A.; and B., after satisfying herself of the truth of the statements made by the father, and relying solely upon the credit of the estate which was to be A.'s at the death of his father, removed A. from the almshouse, and undertook and continued the maintenance of A. for a number of years. *Held*, that the Superior Court was justified in finding, on the facts, that the food, clothing, &c., furnished A., were necessities for which he should be held responsible, notwithstanding that he, being a pauper and an inmate of an almshouse, was supplied with necessities there.

Although a guardian is not obliged to provide for the support of his ward when he has no property of the ward available for that purpose, and although he may, under such circumstances, place the ward in an almshouse, this by no means implies that a boy, with an expectation of a fortune of \$10,000, should be brought up in an almshouse, if any suitable person will take him, and bring him up properly, on the credit of his expectations; and the support and education furnished to an infant of such expectations, whose means were not presently available, fall clearly within the class of necessities.

THIS was an action of contract for articles furnished to the defendant, a minor, by the plaintiff. Hearing in the Superior Court, before BRIGHAM, C. J., without a jury, who found the following facts: Defendant was a minor, who was born in January 1868, and was the only child of George B. Trumbull, who died at the Soldier's

Home in Togus, Maine, November 1st 1883, where he had resided from 1876 and previously. Defendant's mother, who was the wife of said George B. Trumbull, was, on October 25th 1875, committed to the house of industry on Deer Island, Boston, and defendant was, on the same day, sent to the almshouse on said Deer Island as a pauper, and there remained until he was removed to the Marcella street home for paupers and neglected boys and girls, in April 1877. On November 17th 1877, the plaintiff removed defendant from said Marcella street home to her home, he then being a pauper, and in a diseased and sickly condition, and there kept him to the time of bringing this action, and during all this period maintained defendant, providing him with food, clothing, lodging, medical attendance, and nursing when sick, and the means of education, at a cost to plaintiff, which, in addition to the reasonable value of her services in making such provision,—which the court ruled, as a matter of law, was a provision for necessities to defendant,—was not less than the sum stated in the account annexed to the declaration. Plaintiff, on a visit to Togus, and to the Soldiers' Home, in 1876, became acquainted with said George B. Trumbull, who exhibited much distress on account of defendant being an inmate of an asylum for paupers, and his reported sickly condition; stating to her that he, George B. Trumbull, had certain property bequeathed to him by one Susan Bryant, whose adopted son he was, which gave him only a small income, but that at his death the defendant would be worth \$10,000. Plaintiff, at said George B. Trumbull's request, having informed herself of the provisions of the will of Susan Bryant, and of the terms of a lease to one Cutler, made by George B. Trumbull, of the property received from said Susan Bryant, and of the value and income of the estate to which it related, undertook and continued the maintenance of defendant as aforesaid, not in any respect relying upon the credit of George B. Trumbull, but relying solely upon the credit of defendant's estate. One Teele, since November 1883, as guardian of the defendant, has had possession and control of real estate in Boston of the value of about \$8000, which constitutes all of defendant's property. At the close of plaintiff's case defendant offered no evidence, but requested the court to rule, as matter of law, that upon all the facts in evidence on the part of the plaintiff this action could not be maintained. The court refused to rule as requested, and ruled that upon the facts found the plaintiff was entitled to the sum stated in her account, found for the

plaintiff, assessed damages in the sum of \$1112.53, and ordered judgment for plaintiff for that sum; and the defendant alleged exceptions.

Brown & Keyes, for defendant.

J. R. Smith, for plaintiff.

The opinion of the court was delivered by

C. ALLEN, J.—The practical question in this case is whether the food, clothing, &c., furnished to the defendant were necessities for which he should be held responsible. This question must be determined by the actual state of the case, and not by appearances; that is to say, an infant who is already well provided for in respect to board, clothing, and other articles suitable for his condition, is not to be held responsible if any one supplies to him other board, clothing, &c., although such person did not know that the infant was already well supplied: *Angel v. McLellan*, 16 Mass. 31; *Swift v. Bennett*, 10 Cush. 436; *Davis v. Caldwell*, 12 Id. 512; *Barnes v. Toye*, 13 Q. B. Div. 410. So, on the other hand, the mere fact that an infant, as in this case, had a father, mother and guardian, no one of whom did anything towards his care or support, does not prevent his being bound to pay for that which was actually necessary for him when furnished. The question whether or not the infant made an express promise to pay is not important. He is held on a promise implied by law, and not, strictly speaking, on his actual promise. The law implies the promise to pay from the necessity of his situation; just as in the case of a lunatic: 1 Chit. Cont. 197; *Hyman v. Cain*, 3 Jones (N. C.) 111; *Richardson v. Strong*, 13 Ired. 106; *Gay v. Ballou*, 4 Wend. 403; *Epperson v. Nugent*, 57 Miss. 45-47. In other words, he is liable to pay only what the necessities were reasonably worth, and not what he may improvidently have agreed to pay for them. If he has made an express promise to pay, or has given a note in payment, for necessities, the real value will be inquired into, and he will be held only for that amount: *Earle v. Reed*, 10 Metc. 387; *Locke v. Smith*, 41 N. H. 346; Metc. Cont. 73, 75.

But it is contended that the board, clothing, &c., furnished to the defendant were not necessities, because he, "being a pauper, and an inmate of an almshouse, was supplied with necessities, suitable to his estate and condition, and, under the circumstances, it

would have been the duty of the guardian to place him in the almshouse." It is true that a guardian is not obliged to provide for the support of his ward when he has no property of the ward available for that purpose; and, if he has no other resource, no doubt he may, under such circumstances, place the ward in an almshouse. The authorities cited for the defendant go no further than this: *Spring v. Woodworth*, 2 Allen 206. But this by no means implies that a boy with expectation of a fortune of \$10,000 should be brought up in an almshouse if any suitable person will take him, and bring him up properly, on the credit of his expectations. On the other hand, it seems to us highly proper for a parent or guardian, under such circumstances, to do what the father did in this case; leaving it for the boy's guardian to see to it that an unreasonable price is not paid. Looking to the advantage of his subsequent life, as well as to his welfare for the time being, his transfer from an almshouse to a suitable person, by whom he would be cared for and educated, would certainly be judicious; and the support and education furnished to an infant of such expectations, whose means were not presently available, fall clearly within the class of necessities. In Metc. Cont. 70, the authority of Lord MANSFIELD is cited to the point that a sum advanced for taking an infant out of jail is for necessities: *Earl of Buckinghamshire v. Drury*, 2 Eden 72. See, also, *Clarke v. Leslie*, 5 Esp. 28. Giving credit to the infant's expectation of property is the same as giving credit to him.

There was no error in refusing to rule, as matter of law, that upon all the facts in evidence the action could not be maintained. The findings of all matters of fact, of course, are not open to revision. Exceptions overruled.

Since the case of *Bainbridge v. Pickering*, 2 W. Black. 1325, it has never, so far as we know, been questioned, but that an infant who lives with and is properly maintained by his parent or guardian, cannot bind himself to a stranger for necessities: see *Gay v. Ballou*, 4 Wend. 403; *Rivers v. Gregg*, 5 Rich. Eq. 274; *Kraker v. Byrum*, 13 Rich. L. 163; *Kline v. L'Amoureux*, 2 Paige 419; *Wailing v. Toll*, 9 Johns. 141; *Guthrie v. Murphy*, 4 Watts 80; *Angel v. McLellan*, 16 Mass. 31; *Pool v. Pratt*, 1 Chip. 253; *Beeler v. Young*, 1 Bibb 521; *Connolly v. Hull*, 3 McCord 6; *Cook v.*

Deaton, 3 C. & P. 114; *McKenna v. Merry*, 61 Ill. 180; *Nicholson v. Wilborn*, 13 Ga. 475; *Elrod v. Myers*, 2 Head 33; *Perrin v. Wilson*, 10 Mo. 451; *Davis v. Calhoun*, 12 Cush. 513; *Brooker v. Scott*, 11 M. & W. 67; *Burghart v. Angerstein*, 6 C. & P. 690; *Steedman v. Rose*, 1 C. & M. 422; *Story v. Pery*, 4 C & P. 526.

The term necessities is a relative one and includes such things as are useful and suitable to the state and condition in life of the party and not merely such as are required for bare subsistence; and it is a question for the jury whether the

articles furnished are such as a reasonable person of the age and station of the infant would require for real use: *Peters v. Fleming*, 6 M. & W. 42. In this case the action was brought to recover a bill for several rings, a watch-chain, pins, &c., amounting to 8l. 0s. 6d., from the defendant, who was the eldest son of a gentleman of fortune and a member of parliament, and who at the time when the goods were furnished was an undergraduate of the University of Cambridge; and the jury, to whom the question whether the articles were necessary or not, found that they were necessary, and this finding was affirmed by the court.

The articles for which an infant is sought to be charged must not only come within the general class of necessities in law, but must also be in fact necessary to the infant under the particular circumstances in which he is placed: *Reeves's Dom. Rel.* *227. Thus, an over-supply of the infant's wants, though the articles may in other respects be regarded as necessities, gives a demand against him only for so much as was actually needed: *Johnson v. Lines*, 6 W. & S. 80.

Where the minor resides with his parents, it will, in the absence of proof to the contrary, be presumed that he is properly supplied with necessities: *Connolly v. Hull*, 3 McCord 6; *Jones v. Colvin*, 1 McMull. 14; *Perrin v. Wilson*, 10 Mo. 451; *Freeman v. Bridger*, 4 Jones L. 4.

Infancy being shown, the burden of proof is with the plaintiff to show that the articles sued for were necessary for the infant: *Thrall v. Wright*, 38 Vt. 494; *Nicholson v. Wilborn*, 13 Ga. 475; and so whether in the class of necessities or not: *Thrall v. Wright*, *supra*.

Whether the articles are of those classes for which an infant is bound to pay, is matter of law to be judged of by the court; and this question is first to be settled: *Beeler v. Young*, 1 Bibb 521; *Glover v. Ott*, 1 McCord 572; *Bent v. Manning*, 10 Vt. 230; *Tupper v. Cadwell*, 12 Met. 563; *Grace v. Hale*, 2 Humph. 29; *Stanton v. Willson*, 3 Day

57; *Maddox v. Miller*, 1 M. & S. 738; *McKanna v. Merry*, 61 Ill. 178; *Jordan v. Coffield*, 7 W. N. C. 116; *Merriam v. Cunningham*, 11 Cush. 40.

But this preliminary question being determined, "if they fall under those general descriptions, then whether they were actually necessary and suitable to the condition and estate of the infant, and of reasonable price, must regularly be left to the jury as matter of fact:" *Bing. on Inf.* 86, note (1), 87; *Story on Sales*, § 35; *Beeler v. Young*, 1 Bibb 521; *Bent v. Manning*, 10 Vt. 230; *Grace v. Hale*, 2 Humph. 29; *McKanna v. Merry*, 61 Ill. 178; *Jordan v. Coffield*, 7 W. N. C. 110; *Merriam v. Cunningham*, 11 Cush. 40; *Harrison v. Fane*, 1 M. & G. 550; *Stanton v. Willson*, 3 Day 57; *Maddox v. Miller*, 1 M. & S. 738; *Ryder v. Wombwell*, L. R., 3 Exch. 90; s. c. 4 Id. 32. The case of *Ryder v. Wombwell*, may well be read in this connection. It contains an interesting and instructive discussion of the general question of the nature of necessities.

There can be no question but that the food, clothing, &c., furnished the defendant in the principal case, come within the legal class of necessities. It would seem to be equally clear that they were actually necessary to the infant in his then situation. While doubtless an infant will not be liable for necessities furnished him, merely because his father is poor and unable himself to pay for them (*Hoyt v. Casey*, 114 Mass. 397), the credit in this case having been given to the defendant, and the board, clothing, &c., having transferred the defendant from the condition of a pauper to the care of a suitable person, under whose care he had an opportunity to become a useful member of society, to hold that this was not in fact in the highest degree necessary would be contrary to common sense and a disgrace to the law. Upon the whole it seems to us that the decision is beyond question correct.

M. D. EWELL.

Chicago.

Supreme Court of Oregon.

COOK v. PRENTICE ET AL.

An innkeeper who receives a piano in his character as innkeeper, and as the property of his guest, is entitled to his lien against the piano for board and lodging furnished his guest, although the piano is in fact the property of a third person.

Wm. M. Kaiser, for appellant.

Wm. M. Ramsay and *G. G. Bingham*, for respondent.

The opinion of the court was delivered by

LORD, J.—This suit was instituted by the plaintiff, as an innkeeper, to enforce a lien against a piano, put in his possession by the defendant, as his guest, for a debt due for lodging and entertainment. By the facts stipulated, it is admitted that the relation of innkeeper and guest existed between the plaintiff and defendant when the plaintiff, at the request of the defendant, paid the freight charges on the piano, and took it into his custody ; that the piano was in fact the property of a third person, who had consigned it to the defendant to sell on commission ; but that the plaintiff did not know it was the property of such third person, but received it in his character as an innkeeper, and as the property of his guest.

Upon this state of facts we are to inquire whether the piano is chargeable with an innkeeper's lien for board and lodging furnished his guest. At common law the liability of an innkeeper for the loss of the goods of his guest is special and peculiar, and, like that of the common carrier, is founded on grounds of public policy. It must not, however, be confounded with that of a common carrier ; the liabilities, though similar, are distinct: *Clark v. Burns*, 118 Mass. 275 ; *Schouler*, Bailm. 259. Whatever controversy may exist in the judicial mind as to the true measure of the innkeeper's responsibility, it cannot be denied that his liability for the loss of the goods of his guest is extraordinary and exceptional: *Schouler*, Bailm. 261, and notes ; *Coggs v. Bernard*, 1 Sm. Lead. Cas. (Am. notes) 401. Compelled to afford entertainment to whosoever may apply and behave with decency, the law, as an indemnity for the extraordinary liabilities which it imposes, has clothed the innkeeper with extraordinary privileges. It gives him, as a security for unpaid charges, a lien upon the property of his guest, and upon the goods put by the guest into his possession: *Overt. Liens* 129. Nor is the lien confined to property only owned by the guest, but it will

attach to the property of third persons, for whom the guest is bailee, provided only he received the property on the faith of the innkeeping relation: *Schouler*, Bailm. 292; *Calye's Case*, 1 Sm. Lead. Cas. 249; *Manning v. Hollenbeck*, 27 Wis. 202. But the lien will not attach if the innkeeper knew the property taken in his custody was not owned by his guest, nor had he any right to deposit it as bailee or otherwise, except, perhaps, some proper charge incurred against the specific chattel.

In *Broadwood v. Granara*, 10 Exch. 417, the innkeeper knew that the piano sent to the guest did not belong to him, and did not receive it as part of the guest's goods, and it was on that ground alone he was held not entitled to his lien. But in *Threfall v. Borwick*, L. R., 7 Q. B. 711, where the innkeeper had received the piano as part of the goods of his guest, it was held he had a lien upon it. MELLOR, J., said: "When, having accommodation, he has received the guest, with his goods, and thereby has become liable for their safe custody, it would be hard if he was not to have a lien upon them; and, under such circumstances, the lien must be held to extend to goods which he might possibly have refused to receive." LUSH, J., said: "I am of the same opinion. The innkeeper's lien is not restricted to such things as a travelling guest brings with him in journeying; the contrary has been laid down long ago. It extends to all goods the guest brings with him, and the innkeeper receives as his. If he has this lien as against the guest, the cases have established, beyond all doubt, that he has the same right as against the real owner of the article, if it has been brought to the inn by the guest as owner." To the same effect, QUAIN, J., said: "There is no authority for the proposition that the lien of the innkeeper only extends to goods which a traveller may be ordinarily expected to bring with him. * * * The liability, as shown by the old cases, extends to all things brought to the inn as the property of the guest, and so received,—even a chest of charters or obligations; and why not a piano-forte? If, therefore, the innkeeper be liable for the loss, it seems to follow he must also have a lien upon them. And if he has a lien upon them as against the guest, the two cases cited (and there are more) show that if the thing be brought by the guest as owner, and the landlord takes it in thinking it is the guest's own, he has the same rights against the stranger—the real owner—as against the guest." Upon appeal from the decision of this case, in *Threfall v. Borwick*.

L. R., 10 Q. B. 210, it was held, affirming the decision, that whether the defendant, as innkeeper, was bound to take in the piano or not, having done so he had a lien upon it.

Although there are certain *dicta*, not necessary to the decision, in *Broadwood v. Granara*, *supra*, to the effect that the innkeeper was not bound to receive the piano, yet the real ground of the decision was based on the fact that the innkeeper knew that the piano sent to his guest was the property of a third person, and did not, therefore, receive it as part of his guest's goods, and the right to subject the piano to his lien was denied; but *e converso*, if he had not known the piano was the property of a third person, and had received it as the property of his guest, would not his lien have attached? It is not material whether the innkeeper is bound to receive such property or not, although, it is said, the liability may be well extended, according to the advanced usages of society; yet if he does receive it as the property of his guest, and thereby becomes liable for it, he must be entitled to his lien: *Threfall v. Borwick*, *supra*. Whenever, by virtue of the relation of innkeeper and guest, the law imposes this extraordinary responsibility for the goods of the guest, it gives the innkeeper a corresponding security upon the goods put by the guest into his possession.

It is true that the piano was shipped to the defendant in his name, but he brought it to the inn as his property; or, at least, it was brought there at his request, and upon his order, and put in the custody and possession of the plaintiff as the property of his guest. It is admitted that the plaintiff received it as an innkeeper, and safely kept it as the property of his guest; nor is it doubted but what he would have been liable for its loss; and, in such case, it is difficult to perceive upon what principle of law or justice he can be denied his lien.

The judgment must be affirmed.

THAYER, J. (*dissenting*).—Upon the main question in the case there is some doubt, in view of the authorities, upon the subject, though, upon a common-sense view, there would not seem to be any. That the man Kane could pledge the appellant's piano for his own hotel bill, or in any way subject it to the payment thereof, would shock all sense of property right. The respondent's counsel, however, have cited numerous cases where such a lien has attached to the property of a third person, and I have no doubt but that such

lien will, in many cases, attach to the property taken by the guest to the inn at which he obtains accommodations, though he be not the owner of it.

But in all such cases, it seems to me, the property must derive some special benefit, or else the owner must have entrusted it to a party under circumstances from which he could reasonably have concluded that the party would become the guest of an inn, and take the property with him there as his own; and I do not think the rule should extend further than this. In the case under consideration it does not appear that the appellant ever knew that Kane was stopping at a hotel. He sent the piano to him at Baker City, to sell upon commission. It does not appear that the respondent furnished the entertainment upon the credit of the piano, or upon the supposition that it belonged to Kane. The latter might, and so far as I can see would, have continued a guest at the hotel the same whether the piano had been sent or not. It is not a case, as I view it, where the owner of the property has clothed another with the *indicia* of ownership, and a third person been deceived thereby into purchasing it, or giving credit upon the faith of such indication. It was purely a business transaction. The appellant was attempting to make sale of his property, and sent it to Kane for that purpose. The latter had no authority in the premises except to exercise the special power conferred, and it does not appear but that the respondent had full knowledge of the facts as the appellant alleged he did in his answer. I am inclined to believe that the burden of proof was upon the respondent to establish that he supposed the piano to belong to Kane, and that he entertained him upon the faith that such was the fact, before he could claim a lien upon it for the hotel bill. The property of one man should not be taken for the debt of another, against the former's consent, unless he has done some act, or neglected some duty, creating the liability. A party cannot be deprived of his ownership of property to satisfy the claim of another, unless he has, in some form, obligated himself to submit to it. He must have agreed to it in terms, or done some act, directly or remotely, authorizing it. I do not think that the pleadings and agreed facts in this case establish that the respondent had any lien upon the piano for the hotel bill against Kane, or for anything beyond the sum advanced by the respondent for the freight and transportation of it, unless it be for its storage; but the instrument has, doubtless, been used sufficiently to offset any sum for stor-

age, and the appellant duly tendered the amount advanced as freight and transportation.

I think the decree should be reversed as to the appellant.

An innkeeper has a lien on the goods and chattels of the guest, *infra hospitium*, for his lodging and refreshment, and for specific charges against the goods and chattels themselves: *Pollock v. Landis*, 36 Ia. 651; *Thompson v. Lacy*, 3 B. & Ald. 283; *Domestic Sewing Machine Co. v. Watters*, 50 Ga. 573; and cases *infra*.

There are *dicta* to the effect that the innkeeper's lien formerly attached to the person of the guest and to the wearing apparel and ornaments upon the person: *Dunlap v. Thorne*, 1 Rich. (S. C.) 213; *Grinnell v. Cook*, 3 Hill (N. Y.) 483; *Newton v. Trigg*, 1 Show. R. 269. But the doctrine, if it ever had any foundation in authority, is now exploded: *Grinnell v. Cook*, *supra*; *Sunbolf v. Alford*, 3 M. & W. 248; *a. c.* 1 Horn. & Hurl. 13; *Wolf v. Summers*, 2 Camp. 631.

A boarding-house keeper has no lien on the boarder's effects unless specially given by contract or statute: *Hursh v. Byers*, 29 Mo. 469; *Ewart v. Stark*, 8 Rich. (S. C.) 423; *Bayley v. Merrill*, 10 Allen 360; *Brooks v. Harrison*, 41 Conn. 184; *Pollock v. Landis*, 36 Ia. 651; *Sch. Bail.* 294.

A contract to pay so much per week does not make the relation that of boarder and boarding-house keeper, where the length of time the guest is to stay is not an element of the contract: *Berkshire Woollen Co. v. Proctor*, 7 Cush. 417. "The distinction between a guest and a boarder seems to be this: 'The guest comes without any bargain for time, remains without one, and may go when he pleases, paying only for the actual entertainment which he receives; and it is not enough to make a boarder, and not a guest, that he has stayed a long time in the inn in this way.'" *Shoecraft v. Batley*, 25 Ia. 553, citing 1 Pars. Cont. 628; *Story Bail.* § 477.

The innkeeper's lien will not attach unless the goods are received by one in his capacity as innkeeper: *For v. McGregor*, 11 Barb. 41; *Ingallsbee v. Wood*, 33 N. Y. 577; *Binns v. Pigot*, 9 Car. & P. 208; *Orchard v. Rackstraw*, 9 M., G. & S. 698; *Miller v. Marston*, 35 Me. 153.

In *Grinnell v. Cook*, 3 Hill (N. Y.) 485, it is said: "The inquiry then is whether the plaintiff received and kept the horses as an innkeeper. In other words was he bound to receive and take care of them, and would he have been answerable for the loss, if the horses had been stolen without any negligence on his part? The lien and the liability must stand or fall together. Innkeepers cannot claim the one with any just expectation of escaping the other."

In addition to the intimation in the above opinion, it was said by PARKER, B., in *Broadwood v. Granara*, 10 Exch. 417, that the innkeeper's lien would only cover such goods as the innkeeper was bound to receive; but the better opinion seems to be that it will attach to all goods and chattels actually received by one as innkeeper, though he may not have been bound to receive them: *Berkshire Woollen Co. v. Proctor*, 7 Cush. 417; *Threfall v. Borwick*, L. R., 7 Q. B. 711; affirmed 10 Id. 210.

The innkeeper's lien extends to the horses and carriage of the guest, both for specific charges against the same and for the guest's personal entertainment: *For v. McGregor*, 11 Barb. 41; *Pollock v. Landis*, 36 Ia. 651; *Mason v. Thompson*, 9 Pick. 280; *McDaniels v. Robinson*, 26 Vt. 316; *Calve's Case*, 1 Sm. Lead. Cas. 131; *Story Bail.*, § 476. And where horses and carriage are left with one as innkeeper, the owner becomes a guest for the purposes of this lien, though he lodge at another place: *Yorke v. Green*.

argh, 2 Ld. Raym. 866; s. c. 1 Salk. 388; *McDaniels v. Robinson*, 26 Vt. 316. In *Pett v. McGraw*, 25 Wend. 653, the court said, "Besides it is not necessary in point of fact that the owner or person putting the horses to be kept at a public inn should be a guest [lodger?] at the time, in order to charge the innkeeper or to entitle him to the right of lien. * * * If the horses be left with the innkeeper, though the owner may put up at a different place, the former is answerable for the safe keeping, and should of course be entitled to the summary remedy for his reasonable charges."

It has been held that where a guest brings a horse and wagon to an inn where he has been stopping, the lien will attach for the previous entertainment of the guest as well as for subsequent expenses of himself and horse: *Mulliner v. Florence*, 3 Q. B. D. 484.

Where an innkeeper is also a liveryman, in which latter capacity he receives a horse, no lien will arise in his favor against the horse, because the owner afterwards becomes a guest at his house: *Smith v. Dearlove*, 6 M., G. & S. 132.

The lien of the innkeeper may be extended to cover advances made to the guest on credit of his effects: *Watson v. Cross*, 2 Duvall (Ky.) 147; *Proctor v. Nicholson*, 7 Car. & P. 67.

An innkeeper has a lien on the goods and chattels of a third person, lawfully in the possession of his guest and received *infra hospitium*, provided he has no knowledge that the property does not belong to his guest: *Fox v. McGregor*, 11 Barb. 41; *Manning v. Hollenbeck*, 27 Wis. 202; *Grinnell v. Cook*, 3 Hill 485; *Yorke v. Grenaugh*, 2 Ld. Raym. 866; s. c. 1 Salk. 388; *Threfall v. Borwick*, L. R., 7 Q. B. 711; *Turrill v. Crawley*, 13 Id. 197.

If the innkeeper knows that the property belongs to a person other than the guest, he has no lien on it for the guest's expenses, though he might, perhaps, be entitled to a lien for specific charges

against the property itself: *Broadwood v. Granara*, 10 Exch. 417; *Johnson v. Hill*, 3 Starkie 172; *Domestic Sewing Machine Co. v. Watters*, 50 Ga. 573. And in *Snead v. Watkins*, 37 Eng. L. & Eq. 384; s. c. 1 C. B. (N. S.) 267, the principle of allowing an innkeeper's lien against the goods of a third person in the guest's possession seems to be limited to such articles as a guest might ordinarily travel with.

Where a father and two daughters stopped at an inn, it was held that the innkeeper had a lien on the baggage of one of the daughters for her own entertainment only, and not for that of the other two: *Clayton v. Butterfield*, 10 Rich. (S. C.) 300. As to the liability of a wife's baggage for her husband's entertainment, see *Case v. Fogg*, 46 Mo. 44; *Mulliner v. Florence*, 3 Q. B. D. 484.

If the innkeeper voluntarily allows the guest to depart with his goods, his lien is gone, and it will not again attach for the former debt, upon the owner's again putting the goods *infra hospitium* and becoming a guest: *Jones v. Pearle*, 1 Strange 556; 3 Pars. Cont. 249. But the departure of a guest for a short time, *animo revertendi*, or permitting the guest to take a horse away simply to exercise it, will not release the lien: *Allen v. Smith*, 12 C. B. (N. S.) 638; *Caldwell v. Tutt*, 10 Lea (Tenn.) 258; *Grinnell v. Cook*, 3 Hill 485.

The taking of a fraudulent draft in payment of the guest's bill will not release the innkeeper's lien: *Manning v. Hollenbeck*, 27 Wis. 202. And where a boarder paid his bill and sold his goods to another without the boarding-house keeper's knowledge, the goods were held liable for the subsequent board of the boarder with whom they were left, under a statute giving a lien to boarding-house keepers: *Bayley v. Merrill*, 10 Allen 360.

Unless special power of sale is conferred upon the innkeeper by statute, he

must enforce his lien by bill in chancery: *Fox v. McGregor*, 11 Barb. 41; 2 Kent Com. 642.

If he sell the property without such power and without judicial proceedings (except by custom of London and Exeter), he loses his lien and is liable in trover for the value of the property: *Case v. Fogg*, 46 Mo. 44; *Doane v. Russell*, 3 Gray 282; *Mulliner v. Florence*, 3 Q. B. D. 484; *Jones v. Pearle*, 1 Strango 556; *Chase v. Westmore*, 5

Maule & S. 185; *Calge's Case*, 1 Sm. Lead. Cas. 131.

It seems that an innkeeper is not entitled to compensation for storing goods held by him under lien: *Somes v. British Emp. Shipping Co.*, 8 H. L. Cas. 338. As to what is sufficient notice of sale to guest under statutory power of sale, see *Brooks v. Harrison*, 41 Conn. 184.

CHARLES A. ROBBINS.

Lincoln Neb.

United States Circuit Court, W. D., Texas.

WINN v. GILMER.

The citizenship of a party moving from one state into another is controlled by the intention in that regard with which he takes up his residence in the new place.

A party who has moved from one state into another cannot avail himself of the jurisdiction of a federal court upon the claim of being a non-resident, after showing by his acts and declarations, before the litigation commenced, an intention of becoming a citizen in his new place of abode.

SUIT for debt.

Leo. Tarleton, for plaintiff.

Houston Bros., for defendant.

The opinion of the court was delivered by

TURNER, J.—“Citizenship,” as used in the law under consideration, means residence with intention of remaining permanently at that place. A man may reside in a state for an indefinite period of time without becoming a citizen, but the moment a man takes up his residence in a state different from that where he formerly was domiciled or was a citizen, with intent and purpose of making the new place of residence his future permanent home, that moment he loses his former domicile, and becomes domiciled in the new place; or, in other words, he ceases to be a citizen of the former place of residence, and becomes a citizen of the state of his adoption.

The question for me to decide is whether Mr. Winn, the plaintiff, and his assignor, from whom he claims a part of his alleged right of action at the time this suit was instituted, were citizens of Texas. I put the question this way, because, if not citizens of

Texas at that time, it will be conceded that this suit may be properly prosecuted here.

The query raises two questions of fact :

First. Where did these parties reside at the time this suit was brought? As a simple question of residence, it may be safely said, in San Antonio. Both these parties were single men, leading a sort of nomadic life, but for the last two or three years the evidence indicated very clearly that San Antonio was their headquarters, and the place of residence, for business purposes, or for choice or pleasure, it matters not, for the purpose of this decision.

Second question is, was that residence coupled with an intention to permanently remain here? From the nature of the case, no person can judge of the secret intentions dwelling in the minds of other men. The resolutions, intentions and desires of the mind are made manifest by acts which often reveal the inward intention as clearly as it would be if the mind of another was so constructed that it could be opened and read as we read from a printed volume. To illustrate: Suppose a man should approach, and deliberately draw a pistol, and discharge it at the person he was approaching, and should kill him by so doing, we would all say that the act was but the execution of a resolution or determination of the mind in the slayer to do great bodily injury to the person slain, and no declaration of innocent intention, however strongly asserted, would convince the observer that the act was other than wilful, and done in order to carry out a previously formed design. A man throws into the sea an article of value—we know he intended to part with its possession forever.

I have given these strong and abstractly convincing acts to illustrate why it is that we may properly judge of men's intentions by their acts, when not accompanied with declarations; and sometimes we would conclude that the act spoke louder than the declaration, if they were inconsistent with each other. Hence arises the familiar saying that "actions speak louder than words."

The question for me to decide, from all the facts and circumstances revealed by the evidence, is whether, after carefully weighing all the evidence, the citizenship of the plaintiff is such as authorized him to bring this suit in this court. The wisdom displayed in permitting a citizen of another state to sue a defendant who resides in this state has never been doubted, and that right should be carefully guarded and protected, whenever the citizen-

ship is of different states. We know, from observation and experience, that association begets friendship, and friendship begets favoritism and bias in favor of those of whom we think kindly; and a stranger, who should come into a community, and sue a man of good standing, and be compelled to take a jury from the friends and acquaintances of the defendant, would, without any intention on the part of the jury, certainly have to contend against the bias which unconsciously, but inevitably, springs from friendly association. Hence the justice of the law which has created a forum where non-residents can litigate their legal rights; where juries are obtained from widely-separated communities, and therefore not likely to be influenced by any other desire than to administer the law. While this is true, it is none the less true that the right to be tried by one's own peers, and to litigate his rights in the courts of his state, is a right and privilege none the less valuable, and, perhaps, we may safely say more satisfactory to the defeated party than would otherwise be the case.

When a young man leaves the parental home, and strikes out into the world—goes to another state—engages in business for a considerable length of time,—the natural inference would be that he intended to build himself up a new home and domicile in the state where he had taken up his residence. So, likewise, if a man of years, overtaken by misfortune,—perhaps reduced from luxury to penury and want,—with no family ties to bind him, and whose home of former years has passed from him, and from under his control, in the desperation of his situation abandons the state where these misfortunes have overtaken him, and remains away for a term of years,—enters into the business of life with a residence in a neighboring state,—the inference would naturally arise that he had no desire or intention of longer remaining in the locality of all his misfortunes.

Thus much, I think, may safely be said with reference to what would be the natural inference from facts referred to, and these facts are made to appear by the plaintiff's evidence. The evidence of the defendant (which is not disputed) is that the plaintiff, at the dinner-table of defendant, declared his intention to support Mr. Cleveland, and the defendant declared his intention to vote for Mr. Blaine; whereupon plaintiff announced his intention to kill his vote, which was understood to mean, and according to the common use of that expression did mean, that the plaintiff intended

to vote for the candidate of his choice. That the conversation was had, there can be no doubt. This declaration, together with the further declaration that he expected to remain upon and run the ranch, certainly justified the defendant in concluding that the plaintiff had become a citizen of the state. Had it been shown that the plaintiff had exercised the privilege of voting, it would have been conclusive evidence of his having adopted this state as his domicile, and he would not be heard to dispute it, as the law regards that act as conclusive evidence of intention.

It is in evidence, as I have stated, that he said he would vote. It is in evidence, however, that he did not; and it is in evidence that he said he could not vote because not a citizen. The assertion that he would vote (for I hold the declaration in evidence is equivalent to that) is just as persuasive as the declaration that he would and could not, so far as mere declaration is concerned.

The question then arises, is there any reason why one should have more influence in determining upon the weight of this evidence than the other? At the time of the declaration that he would vote, good feeling existed, and no reason can well be assigned for any motive to make such a statement other than to give utterance to a formed design; and the same may be said with reference to the declaration about residing upon and running the ranch in Texas; and if, in fact, the design was formed to become a citizen of Texas at any period during his residence here, he became *ipso facto* a citizen of the state of Texas (he being a native of this country), and any subsequent change of purpose would not restore former citizenship in another state, so long as he continued to reside here. On the other hand, it may be fairly inferred from the evidence that the declaration of not voting because not a citizen was made after the possibility of a suit was made evident, and in that case, if it was regarded as any benefit to sue in this court, then there was a motive in the latter declaration, where none can be assigned for making the former declaration of intention to vote against the vote (or to kill the vote) of defendant. This being so, it follows that, in weighing the evidence, the declaration made when no motive for a misstatement is shown, should outweigh the other one, where a reason can be assigned for making a different statement.

It is but recently that men who are interested in a cause are permitted to testify in the case. The old rule resulted from a knowledge of human weakness, where one's own interests are in-

volved. While a different rule now prevails, human nature has not changed, and if in weighing evidence, and especially where there is a conflict, we forget what self-interest has to do with human action, we come short of duty. I do not wish to be understood by these remarks as reflecting upon the statement of any witness, because nothing has been said or done that would lead to the conclusion of intentional misstatement, but to show the reasons why one statement may properly claim preference over another, made under different circumstances, by the same person, where influenced and controlled by different motives.

The question, then, arises, shall a person so act and make declarations that justify the belief in the minds of those who deal with him that a certain fact exists, and when it suits his interest or convenience assert the contrary? I do not wish to be understood as asserting in this case that the doctrine of estoppel applies, because the defendant has done no act prejudicial to his interest, based upon what plaintiff has said or done. But I do mean to say that a man ought not to so act as to justify the belief that a certain condition of things exists, and then, when it becomes his interest to declare a different state of facts to exist, and the question presented is rendered extremely doubtful, that he ought not to have the benefit of that doubt.

The evidence of Mr. Curiton, plaintiff's assignor, is not that he ever intended to return to Alabama to live. It is true he said he thought he was a citizen of Alabama, if he was a citizen anywhere. This was but an opinion, and the evidence fails to satisfy me that he had not ceased to be a citizen of Alabama.

In conclusion, I may say that acts and declarations of any person, in his own interest, after a controversy has arisen, are received with disfavor. Yet, under the law, a man may be a witness in his own case; but with this privilege comes the duty to those who weigh evidence to discriminate between such evidence as may properly have weight and such as, by the rules of law, should not. In this case, if I have reached a wrong conclusion—which I do not believe—the plaintiff must rest satisfied, because his own conduct and declarations, tending to show citizenship here before any suit was anticipated, have misled me, which acts and declarations I feel in duty bound to hold binding, although those of later date are different.

Cause dismissed.

The question of a party's citizenship, in determining the removability of a cause, from a state court to a federal court, is not infrequently (as in the pri-

cial case), an interesting question. The same general rules of law, as to what constitutes citizenship in other cases, apply in ascertaining the federal jurisdiction in cases of this nature.

What constitutes Domicile.—To constitute a permanent domicile two elements are indispensable: 1st, that of act, and 2d, that of intent—the fact that a person has his permanent home and business at a place with a *present* intention of remaining: *Adams v. Abernathy*, 37 Mo. 198; *Walker v. Walker*, 1 Mo. App. 413; *Exchange Bank v. Cooper*, 40 Mo. 169; *State v. Dayton*, 77 Id. 679; *State v. Finn*, 4 Mo. App. 356; Story on Conf. of Laws (8th ed.) pp. 40, 43, and cases cited in note *a*, on p. 43, and notes *a* and *b* on p. 44; *State v. Daniels*, 44 N. H. 386; *Guier v. O'Daniel*, 1 Am. Lead. Cas. 877, 907; *Wayne v. Greene*, 21 Mo. 357; *Brewer v. Linnaeus*, 36 Id. 430.

In cases involving the question of domicile, the chief question to be considered is the *animus manendi*: *The Venus*, 8 Cranch (U. S.) 279.

A new domicile is not acquired by residence unless it be taken up with an intention of abandoning the former domicile: *De Bonneval v. De Bonneval*, 1 Curtis 864. No length of residence without the intention of remaining constitutes a domicile: *In re Thompson*, 1 Wend. (N. Y.) 45. "The *onus* of proving the change is on the party alleging it. The presumption of law being, that a domicile once acquired, subsists until a change is proved, and the *onus* is not discharged by merely proving residence in another place, which is not inconsistent with an intention to return to the original domicile, for the change must be demonstrated by the *fact* and *intention*:" *De Bonneval v. De Bonneval*, *supra*.

The above language is quoted approvingly in *Isham v. Gibbons*, 1 Bradf. 90.

A domicile once acquired continues until the party has acquired another, by indicating and carrying into effect the

intention of abandoning the old and taking another as his sole domicile: *Somerville v. Somerville*, 5 Vesey 787; Story on Conf. of Laws (8th ed.) p. 53, and cases cited in n. 7.

"The *naked residence* in itself amounts to nothing, unaccompanied with evidence of the *animus*:" *Isham v. Gibbons*, 1 Bradf. 89. "There must be both *animus et factum*:" *Id.* "The change of a domicile must be manifested *animo et facto*, by the *fact* of residence and the *intention* to abandon:" *De Bonneval v. De Bonneval*, *supra*.

The domicile may be in one state or territory and his actual residence in another: *Frost v. Brisbin*, 19 Wend. 11; *Fitzgerald v. Arel*, 18 N. W. Rep. (Ia.) 713; *Bradley v. Frasier*, 54 Ia. 289; *Exchange Bank v. Cooper*, 40 Mo. 169. This is well illustrated in the opinion in *Sanger v. Seymour*, *post*.

Evidence as to Intent.—The declarations of a party made at the time of his change of domicile, expressive of his motive or object, are regarded "as verbal acts, indicating a present purpose and intention," and are admitted as part of the *res gestæ*: Greenl. on Ev. (14th ed.) sect. 108, p. 147. Expressions of intent to reside permanently in a country are evidence of such intention, and, in so far, evidence of domicile: Dicey on Domicile, p. 121, rule 17 and cases. They may be either direct or indirect.

In *Doucet v. Geoghegan*, 9 Ch. Div. 441, the testator was a Frenchman, but had lived a number of years in England, and during most of that time he was engaged in business in England. The action was brought to establish a French domicile. Witnesses were permitted to testify that the testator had made various parol declarations that he intended to return to France when he made his fortune. See *Udny v. Udny*, L. R., 1 Sc. App. 441; *Bell v. Kennedy*, Id. 307.

Gorham v. Canton, 5 Me. 266, was an action for supplies furnished a pauper.

Declarations made by the pauper while residing at C. were admitted as unguarded disclosures of his intentions, and for that reason, forming, in part, the character of his residence in that town. "When the nature of a particular fact is in question, a contemporary declaration by the party who does the act, is evidence to explain it:" 1 Starkie on Ev. 48. This language was quoted, with approval, in *Gorham v. Canton*, *supra*.

Baring v. Calais, 11 Me. 463, follows the ruling of the last case, because such declarations are to be regarded as *facts*, and part of the *res gesta*. A like ruling was made in *Cornville v. Brighton*, 39 Me. 333. Here declarations made by the pauper when going from a town where he was at work to a town where his former settlement had been, as to his intention, respecting his residence, were held admissible. See *Brewer v. Linnaeus*, 36 Me. 430.

In *Thorndike v. Boston*, 1 Met. 242, declarations made by the plaintiff at the time of his departure from Boston, and while he was making preparations to go to Edinburgh, as to his intentions, were held admissible.

In *Brundred v. Del Hoyo*, 20 N. J. L. 333, evidence was admitted, as to declarations of intention of defendant, in an attachment against him, on the ground of non-residence.

In *Smith v. Croom*, 7 Fla. 161, correspondence with members of family was admitted, as showing intention regarding residence. See, further, *Forbes v. Forbes*, 23 L. J. Ch. 724; *Craigie v. Lewin*, 3 Curt. 435; *Curling v. Thornton*, 2 Add. 19; *Ennis v. Smith*, 14 How. (U. S.) 400; *Pennsylvania v. Ravenel*, 21 Id. 103.

Sanger v. Seymour, 25 Fed. Rep. 289, is an interesting case. Here the plaintiff insisted that he was a resident of New York. The testimony was conflicting. The facts were, that from 1845 to 1883, the plaintiff's home was in Brooklyn, N. Y., with the exception of about five

years, when he resided at Bay Side, Long Island. In the spring of 1883, he purchased a farm at Greenwich, Conn., for a summer home. From 1883, until November 1884, he resided in New York city, spending Sundays and the summer with his family at Greenwich. From November 1884, till May 1885, he occupied apartments with his family in New York city. In May he returned to Greenwich for the summer, expecting to occupy his city apartments in the fall. He never voted except in New York, and he claimed that he had always been and intended to be in the future a citizen of New York. In April 1885, he brought suit in a state court in New York against defendants, citizens of New York, who removed the case to the United States court on the ground that plaintiff was a citizen of Connecticut. The court found on these facts that the plaintiff was not a citizen of Connecticut, but of New York, and the cause was remanded to the state court.

The court said (p. 290): "There is no direct proof that he (plaintiff) went to Connecticut, *animo manendi*. He positively denies that he changed his domicile, and asserts that he always intended to remain a citizen of New York. He is supported in this declaration by a number of collateral facts and circumstances. His case is, it would seem, not unlike that of many of the citizens of the metropolis, who spend the summer months at their villas along the Connecticut and Rhode Island coasts. Though they remain away from the city the greater part of the year, they do not, therefore, lose their citizenship. It may be conceded that the question is not free from doubt, but to doubt in such circumstances is to remand the case to a tribunal which unquestionably has jurisdiction," citing *Lemy v. Laclede Bank*, 18 Fed. Rep. 193; *Gribble v. Pioneer Press Co.*, 15 Id. 689; *Wolff v. Archibald*, 14 Id. 369.

See the observations of Judge Lora in *Deimer v. Franz* 27 Fed. Rep. 890,

as to the federal jurisdiction where there is a doubt as to the citizenship of parties.

Chicago & Northwestern Ry. v. Ohle, 117 U. S. 123, is also an instructive case. The suit was brought in a state court of Iowa on the 19th of November 1883, by Ohle, described in the petition as a citizen of Illinois, against the railroad company, an Illinois corporation, to recover damages for an injury sustained by him, while a laborer on a construction train in Iowa. On the 21st of March 1884, the company petitioned for a removal of the suit to the Circuit Court of the United States, on the ground that Ohle was a citizen of Iowa and the railway company a citizen of Illinois. The case was docketed in the Circuit Court of the United States, May 13th 1884, and the next day, May 14th 1884, Ohle moved to remand, because both he and the company were citizens of the same state, to wit, Illinois. On the 22d day of May he was given leave to file a plea in abatement or to the jurisdiction, which he did, August 29th 1884, alleging that both he and the company were citizens of Illinois. Upon this plea issue was joined and a trial had with a jury, October 30th 1884. On the trial it appeared that, at the time of the injury, Ohle was a minor, having his home with his parents, who were citizens and residents of Burlington, Iowa. While still a minor he brought suit, by his next friend, in a state court of Iowa against the company, to recover damages for his injury, which suit was removed by the company to the Circuit Court of the United States. In April 1883, before a trial was had, Ohle went to Janesville, Wisconsin, to attend school for the purpose of learning telegraphy. In October 1883, he went from his school to Des Moines, Iowa, to attend a trial of his suit, which trial resulted in a disagreement of the jury. From there he went to visit his parents in Burlington, where he remained about a week. After the disagreement of the

jury, he discontinued his suit, and about the 6th of November, went to Chicago, Illinois, where he remained until about the 27th of November. While he was in Chicago at this time, the present suit was begun, and the simple question presented on the trial of the issue made, by the reply to the plea to the jurisdiction was, whether he had actually, and in good faith, given up his citizenship in Iowa, and acquired a new citizenship in Illinois before the suit was brought. He was the only witness sworn.

His evidence, in substance, is, that when he went to Chicago, he intended to make that his home. But, in a subsequent part of his testimony, he admitted that this was done so as to prevent the railroad company from removing any other suit he might bring in Iowa to the courts of the United States; yet, according to his testimony, he then, being of full age, did leave Iowa with the *bona fide* intention of abandoning his citizenship in that state, and gaining another in Illinois. He never went back to Iowa to reside. He took a room in Chicago and remained there three weeks. Before this was done the manager of the school in Janesville, where he was being taught, had engaged employment for him in Chicago, which he was to enter upon as soon as he had finished his education. After this suit was brought he went from Chicago to the school in Janesville, with the intention, as he testifies, of returning when he had finished his education; his testimony shows that he did go back on the 13th of March 1884, took up the work for which he had been engaged, and remained there all the time doing that work until he was sworn at the issue on the plea to the jurisdiction in this case. He was examined fully by counsel for both parties. Some things which he testified to had a tendency to prove that he did not in good faith, go to Chicago with the intention at that time, of abandoning his citizenship in Iowa and acquiring another in Illinois. Ohle also

introduced an affidavit made by one of the railway officials, requiring Ohle to give security for costs, on the ground that he was a non-resident of Iowa, in which affidavit it was alleged that Ohle was a non-resident.

On this state of facts the Circuit Court found that Ohle was not a resident of Iowa, so as to give the federal court

jurisdiction on the ground of diversity of citizenship, and the case was remanded to the state court. This ruling was sustained by the United States Supreme Court, Chief Justice WAITE delivering the opinion.

EUGENE McQUILLIN.

St. Louis, Mo.

Supreme Court of Minnesota.

ELLIOT v. SMALL.

A "reservation" is something newly created or reserved out of the thing granted, that was not in esse before.

An "exception" is a part of the thing granted, and of something in esse at the time of the grant.

A warranty deed conveyed a parallelogram of land "containing five acres," but "reserving from said grant a strip, thirty-three feet wide on the south side of said tract, for a public street." *Held*, that the fee to the strip thirty-three feet wide was in the grantee; and that if it was either an exception or reservation it was the latter.

APPEAL from the District Court of Hennepin county.

Shaw & Cray, for appellant.

Hart & Brewer, for respondents.

The opinion of the court was delivered by

BERRY, J.—The warranty deed involved in this case granted and conveyed "all the following described piece or parcel of land, * * * viz.: Beginning at the northeast corner of section thirty-four * * * thence westerly on the section line, nine chains and ninety-six links; thence southerly five chains and two links; thence easterly nine chains and ninety six links; thence northerly five chains and two links. to the place of beginning; * * * reserving from said grant a strip thirty-three feet in width, on the south side of said tract, for a public street, and a strip thirty-three feet in width, on the east side, which is now used and occupied as a public road and highway." The parallelogram of land thus described—nine chains and ninety-six links by five chains and two links—contains five acres, the quantity specified in the deed. The description is precisely that which is appropriate to the conveyance of the entire five acre tract; whereas, if the intention had been to exclude from the grant a strip thirty-three feet wide off of the south side of the five-acre tract,

then, inasmuch as the description is by distances, or dimensions of length and width, the more obvious, simple and natural way of exclusion would have been to describe the tract intended to be conveyed as being thirty-three feet narrower than the tract in fact described; that is to say, as being four chains and fifty-two links, instead of five chains two links in width.

It is difficult to see why, when he had adopted the plan of describing the property by its *width* in chains and links, the grantor should have specified a width greater than the actual width of the premises which he intended to convey, or why he should have embraced in the specified width thirty-three feet more than he intended to convey, simply for the purpose of taking it out again. The obvious and natural construction is that he meant to convey *all* that he described as a five-acre tract—nine chains ninety-six links long, by five chains two links wide.

This being the apparent intention of the grantor in his description of the five-acre tract, how is it affected by the so-called “reservation?” Certainly, that does not operate to except from the tract the *fee* of the thirty-three feet strip on the south side, for this would be inconsistent with the intention mentioned (if not repugnant, and therefore void), but to reserve an easement of right of way for a public street in and over the strip. As it did not except the fee, and the strip had never been used as a strip, and no street had ever been laid out or opened upon it at the time of the grant, the so-called “reservation” was not, strictly speaking, an *exception* of anything; for an *exception* is of a part of the thing granted, and of something *in esse* at the time of the grant. A “reservation” is defined to be something *in esse* newly created or reserved out of the thing granted, that was not *in esse* before; as, for instance, an easement: *Hurd v. Curtis*, 7 Met. 94; *Winthrop v. Fairbanks*, 41 Me. 312; Boone, Real. Prop. § 303. So that although the terms “exception” and “reservation” are often used indiscriminately, and the difference between them is in particular cases sometimes obscure and uncertain (*Bowen v. Conner*, 6 Cush. 132, and cases *supra*; *Roberts v. Robertson*, 53 Vt. 690), the so-called “reserving” of the thirty-three-foot strip in this case, “for a public street,” would be a “reservation” proper (if anything), as distinguished from an “exception,” properly so called. And right here, and upon this point, it is important to observe that the strip is reserved “for a public street.” If the grantor intended to except the fee of the

strip from the grant, his intention was not expressed. The strip is "reserved" for a public street, and for nothing else. This does not require the exclusion of the fee of the strip from the grant, but only an easement; and upon the principle that a grantor's deed is to be taken most strongly against himself, no such exclusion of the fee is to be implied.

Our construction of the deed, then, is that it passed to the grantee the fee of the whole of the five-acre tract: *Peck v. Smith*, 1 Conn. 103; *Richardson v. Palmer*, 38 N. H. 212; *Tuttle v. Walker*, 46 Me. 286; *Kuhn v. Farnsworth*, 69 Id. 404; *Hays v. Askeu*, 5 Jones 63; *Cincinnati v. Newell's Heirs*, 7 Ohio St. 37. Whether the reservation was of no effect because it was to a stranger and not to the grantor, as held according to the old common law (*Hornbeck v. Westbrook*, 9 Johns. 73), or whether it is valid in favor of the public, as appears to be held or intimated in *Tuttle v. Walker*, and *Cincinnati v. Newell's Heirs*, *supra*, is a question with which the case at bar would appear to have no particular concern.

Order denying new trial affirmed.

Definition.—In Sheppard's Touchstone it is said that a "reservation is a clause of a deed, whereby the feoffor, donor, lessor, grantor, &c., doth reserve some new thing to himself out of that which he granted before."

And afterwards, "this doth differ from an exception, which is ever of part of the thing granted, and of a thing *in esse* at the time; but this is of a thing newly created or reserved out of a thing demised, that was not *in esse* before; so that this doth always reserve that which was before, or abridge the tenure [tenor] of that which was before." Again, "it must be of some other thing issuing or coming out of the thing granted, and not a part of the thing itself, nor of something issuing out of another thing." "If one grant land, yielding for rent, money, corn, a horse, spurs, a rose, or any such like thing, this is a good reservation; but if the reservation be of the grass or of the vesture of the land, or of a common or other profit to be taken out of the land, then those reservations are void:" p. 80. See Coke on Litt. 47 b;

Earl of Cardigan v. Armitage, 3 D. & R. 414; 2 Barn. & Cress. 197; Bro. Abr. *Reservation*, p. 46; 19 Vin. Abr. 116, 126; *Craig v. Wells*, 11 N. Y. 321.

"An exception is something taken out of that which is before granted, by which means it does not pass by the grant, but is severed from the estate granted. A reservation is something issuing out of the thing granted, and not a part of the thing granted:" *Cunningham v. Knight*, 1 Barb. 407; *Gould v. Glass*, 19 Id. 192; *State v. Wilson*, 42 Me. 21; *Ryckman v. Gillis*, 6 Lansing 81; *Miller v. Lapham*, 44 Vt. 434; *Pursell v. Stryker*, 41 N. Y. 483; *Dyer v. Sandford*, 9 Met. 395; *Kister v. Reeser*, 98 Penn. St. 1; s. c. 42 Am. Rep. 608. "Indeed, the books treat of an exception upon the theory that it is a re-grant by the grantee to the grantor of the estate described in the exception:" *Roberts v. Robertson*, 53 Vt. 690; s. c. 38 Am. Rep. 710; *Adams v. Morse*, 51 Me. 497.

Rule of Construction.—"It is a rule of construction, that where there is a grant

and an exception out of it, the words of the exception are to be considered as the words of the grantor, and are to be construed in favor of the grantee:" per HOLROYD, J., *Bullen v. Denning*, 5 B. & C. 850, see *Woodroff v. Greenwood*, Cro. Eliz. 518; *Earl of Cardigan v. Armitage*, *supra*, p. 208; *Marvin v. Brewster Iron Mining Co.*, 55 N. Y. 538; s. c. 14 Am. Rep. 322; *City of Waterloo v. Union Mill Co.*, 59 Iowa 437; s. c. 13 N. W. Rep. 433; *Duryea v. Mayor, &c., of City of New York*, 62 N. Y. 592.

In the absence of express stipulation, the grantor of a part of a tenement retains no rights of any nature over the part granted: *Suffield v. Brown*, 4 DeG., J. & S. 194; *Wheeldon v. Burrows*, 12 Ch. Div. 31; *Russell v. Watts*, 25 Id. 559.

The use of the word "reserve" does not always give the deed the effect of a reservation; nor does the use of the word "except" turn a reservation into an exception. In speaking of a reservation Coke says, "sometimes it hath the force of saving or excepting, so as sometimes it serveth to reserve a new thing, viz., a rent, and sometimes to except part of the thing in *esse* that is granted:" Coke on Litt. 143 a.

Thus where the defendant pleaded that the plaintiff was tenant to the defendant of the close in which, &c., subject to a reservation to the defendant of all pits in the close, with liberty to carry away the produce of the pits, BAYLEY, J., said it was not a reservation, but an exception, and held the plea bad: *Fancy v. Scott*, 2 Man. & Ryl. 335.

So where Sir Thomas Denby enfeoffed the Earl of Sussex of certain closes, *except* and always *reserved* out of the said feoffment to the said Sir Thomas all the coals in all or any of said land, together with the free liberty to sink and dig pits, this was held to constitute an exception: *Earl of Cardigan v. Armitage*, *supra*.

So where a clause in a lease purported

to *reserve* underwood and underground produce, it was held to enure as an exception, and not as a reservation: *Douglas v. Lock*, 4 Nev. & Man. 807.

Even though words of reservation be used they will be construed as an exception, if such was the design of the parties: *Kister v. Reesser*, 98 Penn. St. 1; s. c. 42 Am. Rep. 608.

Thus where a deed in fee of land was made, the grantor "saving and reserving, nevertheless, for his own use the coal contained in the said piece or parcel of land, together with free ingress and egress by wagon-road to haul the coal therefrom as wanted," it was held that the saving clause operated as an exception of the coal. The coal was land and the reservation of that part of the land excepted from the grant. It was a thing corporate, existing when the grant was made, and differed from something newly created, as rent or other interest strictly incorporeal: *Whitaker v. Brown*, 10 Wright (Pa.) 197; *Heflin v. Bingham*, 56 Ala. 566; s. c. 28 Am. Rep. 776; *Hoit v. Stratton Mills*, 54 N. H. 109; s. c. 20 Am. Rep. 119. See *Marvin v. Brewster Mining Co.*, 55 N. Y. 538; s. c. 14 Am. Rep. 322; *Knotts v. Hydrick*, 12 Rich. 314. So where a deed to a railroad company contained a clause "reserving to myself the right of passing and repassing and repairing my aqueduct logs forever, through a culvert six feet wide, and rising in height to the superstructure of the railroad, to be built and kept in repair by said company," it was held to confer on the grantor a new right not previously vested in him, operative as a reservation and not as an exception, and vesting only an estate for life: *Ashcroft v. Eastern Rd.*, 126 Mass. 196; s. c. 30 Am. Rep. 672.

And where a deed *reserved* to the grantor "the right of mining on the above-granted premises, for the use of said company [the grantor], an amount of ore not exceeding 7000 tons annually, at a duty of thirty-seven and one-

half cents per ton, including all the facilities needful for doing the same," it was construed as a reservation of new rights to the grantor, out of the granted premises: or else as the creation of such new rights by force of words of reservation, taking effect either by way of estoppel, or as a grant from the grantee by implication of law from the acceptance of the deed: *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290.

So a defeasance may operate as a reservation in favor of the grantor: *Jackson v. McKenny*, 3 Wend. 233; s. c. 20 Am. Dec. 690.

A very good illustration of a reservation is reserving the right of light and air to pass over the land sold so as to reach land still owned by the grantor: *Gay v. Walker*, 36 Me. 54; s. c. 58 Am. Dec. 734.

A deed described a tract of land without any reference to a stream included within the bounds. It then proceeded as follows: "And it is to be understood, and it is the intention of this deed, to convey to the said A. C., as much of the privilege of the water as shall be sufficient for the use of a fulling mill, or a bark-mill, whenever there is a sufficiency therefor." This was held to be a reservation of the surplus water, and not void, for inconsistency with the granting clause: *Sprague v. Snow*, 4 Pick. 54.

Where the covenants of warranty in a deed were followed by the clause "except all the wheat on the ground or land as above described," the deed was construed as not reserving the wheat to the grantor but as excepting it from the warranty: *Kwapp v. Woolverton*, 47 Mich. 292; s. c. 11 N. W. Rep. 164.

A deed conveyed "all that piece or parcel of land described as follows, to wit, being the northeast quarter of section 32, except forty acres in the southeast corner of said section." It was held that the deed did not convey the forty acres excepted: *Babcock v. Lattermer*, 30 Minn. 417; s. c. 15 N. W. Rep. 689.

A. claimed an island under a survey and patent describing it as containing four acres and twenty perches, strict measure, and describing it by courses and distances only. He conveyed the same quantity by the same description, "excepting and reserving twenty perches at the upper end of said island." Leases had been made at different times of a certain twenty perches. It was held that these twenty perches were to be considered as having been excepted from the deed: *Hartley v. Crawford*, 81 Penn. St. 478.

The defendant, by a warranty deed, conveyed to the plaintiff's grantor a certain piece of land, reserving the right to enter upon a portion of it "at all times thereafter, so long as the clay and sand may last or be used for brick-making purposes," and to dig and take therefrom the clay and sand that may be found thereon fit for brick-making. In digging and removing clay and sand, within the boundaries of the portion described, some of the adjoining land fell into the excavation. It was held, in an action for an injunction, that the clause was a reservation and not an exception; that the defendant was entitled to exercise the rights reserved anywhere within the boundaries of the parcel described; that the doctrine of lateral support did not apply; and that the plaintiff could not maintain his action: *Ryckman v. Gillis*, 57 N. Y. 68.

By deed certain premises were conveyed to a religious society, and a right to build a basement story upon the premises, to be used solely for the purposes of a school, with a right of passage to and from it, was reserved. The grantee was to build a church upon the basement walls; and a privilege was given to him to purchase the basement. It was held that the deed vested the fee in the grantee, with the reservation of an easement merely: *Reformed Church of Gallupville v. Schoolcraft*, 65 N. Y. 134, reversing same case, 5 Lans. 206.

Reserving Timber.—It is no uncommon thing for timber to be reserved by the grantor of a deed. Usually there is a limitation imposed upon the length of time the grantor shall have to remove it. Thus where both the standing and lying timber was reserved, to be removed within one year, the right of removal was held to be limited to that time, but the manufacture of such timber into stavebolts on the premises authorized its removal after that time: *Golden v. Glock*, 57 Wis. 118; s. c. 46 Am. Rep. 32. In such a case "the absolute right of property in the trees was not excepted out of the estate granted, but only a right reserved to enter within the time limited, to cut and remove the same:" *Rich v. Zalsdorff*, 22 Wis. 544; *Martin v. Gilson*, 37 Wis. 360; *Strasson v. Montgomery*, 32 Id. 52.

A like decision was rendered in Pennsylvania, where the reservation was the right to cut "at any and all times, also the right of ingress and egress at any and all times, for the space of twelve years from the date above written, for the purpose aforesaid:" *Saltonstall v. Little*, 90 Penn. St. 422; s. c. 35 Am. Rep. 683, citing Bacon's Abr., tit. *Grant*.

So where the reservation was of all the timber suitable for rafting and sawing of every description, and no limit of time was imposed, it was held that "the grant was in its very nature determinable; the right to cut timber was not to continue for ever at the pleasure of the grantee and his assignee; and if from the destruction of the trees, the subject of it, or the refusal of the party to exercise his right after a reasonable notice to do so, the right itself is determined, the privilege of entry is gone with it, and the owner of the land may sue for breach of close, though he may not recover in damages the value of trees taken, the property of which is not in him: *Boults v. Mutchell*, 3 Harris (Pa.) 371.

In an early case in Maine it was held that the right of the grantor was limited

by the time specified, because any other rule would be highly injurious: *Pease v. Gibson*, 6 Me. 84; *Howard v. Lincoln*, 13 Id. 122.

In Vermont stone was reserved to be removed within a time certain. The court said: "If the property was removed by that time, it belonged to the plaintiffs; but if not removed by that time their right to it was gone. This seems to be the natural and obvious construction of the deed: *Holton v. Goodrich*, 35 Vt. 19. The same principle has been ruled in New York: *Boisubain v. Reed*, 2 Keyes 323; s. c. 1 Abb. Ct. Dec. 161; see also *McIntyre v. Barnard*, 1 Sandf. Ch. 52; *Warren v. Leland*, 2 Barb. 622.

For a continuous reservation, see *Clap v. Draper*, 4 Mass. 266; *Prescott v. Pulsifer*, 10 Gray 49.

But there are cases holding a different view of this question. Thus where the deed reserved the timber, the grantee stipulating that the grantor should have two years to remove it, it was held that it might be removed after that time. It was said that there was no expressed intention of the parties that a failure to remove it within two years should work a forfeiture; and no such inference could be drawn from the nature of the transaction: *Irons v. Webb*, 12 Vroom 203; 32 Am. Rep. 193.

Roadway.—It is no uncommon thing for a roadway to be reserved over or along a tract conveyed. Where a reservation of a right of way along the bank of a river was made, it was held not to withhold the freehold of the road-bed from the grantees of the land over which the road ran. In such a case the title vests subject to the easement: *Hagan v. Campbell*, 8 Port. (Ala.) 9; s. c. 33 Am. Dec. 267.

So where a deed conveyed a certain farm by metes and bounds, "reserving to the public the use of the road through said farm; also, reserving to the White

Mountain Railroad the roadway for said road, as laid out by the railroad commissioners; and also reserving to myself the damages appraised for said roadway way by the commissioners and selectmen," it was held that the intention of the grantor was to convey to the grantee the lands over which the public highway and railroad had been laid out and established, subject only to the right of way of the public in the highway and in the railroad way as laid out, reserving to himself the damages: *Richardson v. Palmer*, 38 N. H. 212. See *Leavitt v. Toole*, 8 Id. 96; *Winthrop v. Fairbanks*, 41 Me. 311; *Bridger v. Pierson*, 45 N. Y. 601.

In a deed, a reservation of "a road ten feet wide along the line of Joseph Burger, to be shut at each end," was held to carry only a right of way and not the fee of the strip of the land: *Kister Reeser*, 98 Penn. St. 1; s. c. 42 Am. Rep. 608.

No a reservation of the right to open a highway "the whole length of the east line; and if a public highway shall be laid out, all the rights of the grantor in said reserved highway are to pass to the grantee," was held to reserve the right to dedicate a highway, the fee therein to belong to the grantee: *Dunn v. Sandford*, 51 Conn. 443.

A grant of land was made, "saving and excepting from the premises hereby conveyed all and so much and such part and parts thereof as have been lawfully taken for a public road." It was held that the fee in the soil of the road, and not merely an easement, was reserved to the grantor: *Munn v. Worrall*, 53 N. Y. 44; s. c. 13 Am. Rep. 470. See *Peck v. Smith*, 1 Conn. 103; *Craig v. Wells*, 11 N. Y. 315.

How created.—If reservation of inheritance is intended to be made, then the deed must be as specific in the words of reservation as if it was intended to convey an estate of inheritance. A reservation

to the grantor alone will be the reservation of a life estate only: *Ashecroft v. Eastern R.R.*, 126 Mass. 196; s. c. 30 Am. Rep. 672; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290.

It cannot be created by parol: *Wickersham v. Orr*, 9 Iowa 253; *Bond v. Coke*, 71 N. C. 97; *Wilder v. Wheelton*, 56 Vt. 344; *Strout v. Harper*, 72 Me. 270. Where, however, the use of the usual words of inheritance in a common-law deed are dispensed with by a statute, they need not be used in the reservation: *Karmuller v. Kroitz*, 18 Iowa 358.

So if the reservation is such a one as is appurtenant to the land conveyed, or to land yet owned by the grantor, words of inheritance need not be used: *Winthrop v. Fairbanks*, 41 Me. 309; *Smith v. Ludd*, Id. 314; *Burr v. Mills*, 21 Wend. 290; *Borst v. Empie*, 1 Seld. 33; *Cathcart v. Bowman*, 5 Barr (Pa.) 317; See *Garrison v. Rudd*, 19 Ill. 558.

Since an exception is the creation of no new right in the grantor, but simply allows him to have that which he had before—leaving the fee in him as it was before the deed by him was executed—it would seem that no words of inheritance are necessary to create an exception for a period longer than the lifetime of the grantor. But this distinction seems to have been overlooked.

In *Horneby v. Clifton*, Dyer 264 b, it is stated that words of inheritance should be used in an exception, although the case before the court was a reservation. So the same is said in a note to this case, citing an old case.

Sheppard's Touchstone lays down the same rule, citing the *Dyer Case*, 100.

So in Massachusetts, in a case of a reservation, the rule is said to apply to an exception: *Curtis v. Gardner*, 13 Met. 457; and afterwards in a case of an exception this statement was adhered to: *Jamaica Pond Aqueduct Corporation v. Chandler*, 9 Allen 159.

The reservation or exception may be created by a reference to another deed

containing it: *French v. Carhart*, 1 N. Y. 96.

Reservation must be to Grantor.—It has been said that a reservation to be good must be to the grantor; and "it is not the less made to him if others can derive advantage from it. It will be considered as made to him when valuable rights are secured to him, although it may be perceived that others may also be benefited by it:" *Gay v. Walker*, 36 Me. 54; s. c. 58 Am. Dec. 734; *Hill v. Lord*, 48 Me. 95; *Bridger v. Pierson*, 45 N. Y. 601; *West Point Iron Co. v. Reymert*, 45 N. Y. 707; *Borst v. Empie*, 1 Seld. 33; *Karmuller v. Krotz*, 18 Iowa 358; *Moore v. Earl of Plymouth*, 3 B. & A. 66; *Hornbeck v. Westbrook*, 9 Johns. 73; *Craig v. Wells*, 11 N. Y. 318; *Barber v. Barber*, 33 Conn. 335.

Even a reservation by one tenant in common, conveying his interest to himself of a right of way over the land held in common, is void: *Marshall v. Trumbull*, 28 Conn. 183; s. c. 73 Am. Dec. 667.

But a reservation to him and his cotenant is good: *Pettee v. Hawes*, 13 Pick. 323. See, generally, *Bridger v. Pierson*, 45 N. Y. 601.

"A reservation in a deed will not give title to a stranger, but it may operate, when so intended by the parties, as an exception from the thing granted, and as notice to the grantee of adverse claims as to the thing excepted or 'reserved:'" *West Point Iron Co. v. Reymert*, 45 N. Y. 707.

Out of the thing granted.—So a reservation must be out of the thing granted. It cannot be out of a thing not granted, for there is nothing for it to operate upon: *Hurd v. Curtis*, 7 Met. 110; *Hathaway v. Payne*, 34 N. Y. 92.

But "a grantor may except lands, either because he does not own and cannot convey them, or because he does not intend to convey them if he is the owner:" *People v. Rector, &c., of Trinity*
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Church, 22 N. Y. 44, 53. Yet in another case in the same state it is said that "an exception to be good 'must be a part of the thing granted and not of some other thing,'" citing *Shep. Touch.* 78; *Co. Litt.* 47; 1 *Atkinson on Conveyances* 322; and 2 *Prest. on Con.* 462; *Mathews v. Mathews*, 3 Am. L. Reg. (O. S.) 119.

A. conveyed to B. "the undivided half of lot 10," excepting therefrom "so much of said premises as may have heretofore been conveyed (if any) by the party of the first part to M." The previous deed from A. to M. was a quitclaim for a parcel of ground included in lot 10; but at the time of its execution, A. had no title to any part of the lot. It was held that B. took the undivided half of lot 10, as if no exception had been expressed in the deed to him: *Blossom v. Ferguson*, 13 Wis. 75.

When void.—"But if the reservation embraces all these things, it is as extensive as the grant, and therefore void:" *Dunham v. Kirkpatrick*, 101 Penn. St. 36; s. c. 47 Am. Rep. 696; *Pyncheon v. Stearns*, 11 Met. 312; s. c. 45 Am. Dec. 210; *Hurd v. Hurd*, 64 Iowa 414; s. c. 20 N. W. Rep. 740. And it has been held that there cannot be reserved in a grant that which will deprive the grantee of the enjoyment of the whole thing granted, and that a clause to that effect must be rejected as absurd and repugnant to the deed; *Hilton v. Ld. Granville*, 5 Q. B. 701. But this case has been questioned and finally overruled: *Roubootham v. Wilson*, 8 H. L. Cas. 348; *Duke of B. v. Wakefield*, L. R., 4 H. L. 377. See *Hext v. Gill*, L. R., 7 Ch. App. 700.

So one cannot sell land in fee and reserve to himself the right to the price to be obtained on his grantee's sale: *Dennison v. Taylor*, 15 Abb. N. Cas. 439

So an exception may be made to depend, either for its existence or continu-

ance, on a condition : *Irons v. Webb*, 12 Vroom 203 ; s. c. 32 Am. Rep. 193.

Where a warranty deed was conditioned for a reservation of all the grantor's right, title and interest for life, this was held to be a valid reservation : *Gravers v. Atwood*, 52 Conn. 512 ; s. c. 52

Am. Rep. 610 ; *Webster v. Webster*, 33 N. H. 18 ; *contra*, *Ward v. Ward*, 2 Haywood (N. C.) 28, an exception held void ; also, in *In re Young*, 11 R. I. 636.

W. W. THOMTON.

Crawfordsville, Ind.

Supreme Court of Tennessee.

PARKER v. STATE.

The carrying on of one's ordinary business on Sunday, is an indictable offence at the common law, and also under the statutes of Tennessee, if conducted so openly as to attract public observation and tend thereby to the corruption of public morals.

It is no defence against such a prosecution that the accused conscientiously believes in observing, and actually observes, the "seventh" rather than the "first" day of the week as the Sabbath.

APPEAL from Circuit Court, Henry county.

Indictment and conviction for violating the "Sunday law" by carrying on ordinary business as a blacksmith. Exceptions, and appeal by the respondent.

Cole, Sweeney & Ward, for plaintiff.

The Attorney-General, for the state.

The opinion of the court was delivered by

DEADERICK, C. J.—Parker was convicted in the Circuit Court of Henry county, for following and exercising his avocation of blacksmith, upon Sunday, in April 1885, and on divers other Sundays before that date, and up to the time of taking this inquisition ; and the indictment avers said work was a disturbance and nuisance to the good citizens of said county ; and it averred that such work was not necessary, or a matter of charity. Another count charges that Parker was guilty of a public nuisance by such work on Sunday, to the prejudice of the public morals, contrary to the statute, &c. The proof upon the trial was, that the defendant was a blacksmith, having a shop near Springville, in said county, and numerous witnesses testify to having seen him at work at his trade, in his shop, upon different Sundays, within twelve months before the finding of the indictment. One witness said he knew defendant worked at his business every Sunday.

The defendant's counsel insisted that, although it is proved that

defendant worked at his trade on Sunday, there is no evidence to show that he disturbed or damaged any person thereby, so as to constitute a nuisance, and unless it does appear by proof that some person or persons were disturbed or annoyed, the offence might be punishable under section 2289 of the New Code, but is not indictable. It is held in *Gunter v. State*, 1 Lea 129, 130, that hunting or fishing on Sunday may be punished by indictment, and these offences are declared punishable by the same penalties as those prescribed in section 2289, New Code. See section 2290. So that the working at one's trade, under such circumstances, and to such extent, as to amount to a nuisance, is indictable.

Judge MCKINNEY says, in a case where a defendant had been indicted and convicted for the utterance of obscene words in public, and quoting from Bl. Com. 42, that the municipal law looks to more than the protection of the lives, liberty and property of the people. Regarding Christianity as part of the law of the land, it respects and protects its institutions, and assumes likewise to regulate the public morals and decency of the community. The same enlightened author distinguishes between the absolute and relative duties of individuals as members of society. He shows that while human laws cannot be expected to enforce the former, their proper concern is with social and relative duties. Hence, however abandoned in principle, or vicious in practice, a man may be, if he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of the law; but if he make his vices public, they then become, by the bad example they set, of pernicious effect to society, and are punishable by the law: *Bell v. State*, 1 Swan. 42; citing 1 Bl. Com. 124; 1 Id. 41, 42. .

In an indictment for profanity, which is punishable under the statute by pecuniary penalty like this case, it was held that when the vicious acts are public they will be dealt with as crimes, because of their tendency to disturb and annoy others, and exert a baneful influence upon the morals and habits of the community. Generally, any practices tending to disturb the peace and quiet of communities, or corrupt the morals of the people, are indictable as public offences by common law: *State v. Graham*, 3 Sneed (Cooper's ed.) 133, and cases there cited. In *Gaines v. State*, 7 Lea 410, it is held that profanity, when it becomes a public nuisance, is indictable; but in that case it was held the case was not made out, but a single act being proved. In 1 Bish. Crim. Law, sect. 946, it is said

public profane swearing and blaspheming have been held in this country, to be indictable at the common law, yet, less, according to some of the judges, as tending to sap the foundations of Christianity, than as disturbing the peace and corrupting the morals of the community. In the next section it is said; "But however uncertain may be the precise extent to which the common law protects Christianity, there is no question that it practically and fully cherishes the public morals, and it punishes as a crime every act which it deems sufficiently evil and direct, tending to impair the public morals; and while a single act of the class forbidden by the statute may be punished by a specific fine, as prescribed by the statute, yet, if repeated and continued, it becomes punishable by indictment at common law:" *Id.* 1055. See, also, section 939, 2 Bish. Crim. Law, where it is said, that the doctrine has been laid down in Pennsylvania that, though a single act of Sabbath-breaking is punishable by a fine, there may be such a succession of acts of the same sort as will amount to an indictable offence.

The statute makes it unlawful for any one of the enumerated classes to follow his ordinary secular vocation on the Sabbath-day, because it is immoral, and is of pernicious effect; and though it may be conceded that a single offence may be liable only to the penalty prescribed by the statute, yet a succession of such acts becomes a nuisance, and is indictable. Such a succession and repetition of the acts is shown in this case, as one witness says that defendant did work at his trade, as blacksmith, in his shop near Springville, every Sunday, and others testify to similar acts on many Sundays within twelve months before the finding of the indictment; nor is it necessary to a conviction that the proof should show that any person was disturbed thereby. It is sufficient that the acts which the law holds as illegal and forbidden, have been done in such public manner as to have been open to the observation of the public. Their tendency is to corrupt public morals, and the example is pernicious, and contrary to law and the well-being and good order of society.

The defendant offered to prove that he belonged to a "Christian sect," who kept the seventh instead of the first day of the week, as Sunday. "A general prohibition against doing worldly business on the Lord's day, extends to persons who conscientiously observe the seventh day of the week as the Christian Sabbath:" 1 Bishop's Criminal Law, sect. 267. There was, therefore, no error in

excluding the offered testimony, nor in refusing to charge as requested.

There is no error in the record for which the judgment should be reversed, and it will be affirmed.

AT COMMON LAW.—The principle of the first head note to the principal case is probably correct, and the open violation of Sunday was probably an offence at common law: *Comm. v. Jeandell*, 2 Grant's Cas. 506; Bishop's Cr. Law, § 499, and cases cited. But doubt has been cast upon this doctrine: *State v. Brooksbank*, 6 Ired. 73; *State v. Williams*, 4 Id. 400, and cases cited.

CONSTITUTIONALITY OF STATUTE LAWS.—Most of the states of the Union have statute laws forbidding ordinary employments on Sunday. Though the constitutionality of such laws has been questioned frequently, the writer knows of but one instance where it has been done successfully. In *Ex parte Newman*, 9 Cal. 502, it was held by two judges, Justice FIELD dissenting, that a law which prevented a Jew, who conscientiously observed the seventh day of the week, from keeping open his clothing store on Sunday was unconstitutional, as being a "discrimination and preference" against a religious belief, and as hindering the free enjoyment of property rights. But the authority of this case was overruled in *Ex parte Andrews*, 18 Cal. 678, and the constitutionality of Sunday laws has been upheld by a remarkable unanimity of authorities: *Frolickstein v. Mayor of Mobile*, 40 Ala. 725; *Shover v. State*, 5 Eng. (Ark.) 259; *State v. Anderson*, 30 Ark. 131; *Ex parte Bird*, 19 Cal. 130; *Hall v. State*, 3 Kelley (Ga.) 18; *Voglesong v. State*, 9 Ind. 112; *Eitel v. State*, 33 Id. 201; *State v. Bott*, 31 La. Ann. 663; *State v. Amba*, 20 Mo. 214; *State v. Fearson*, 2 Md. 310; *Bode v. State*, 7 Gill (Md.) 326; *State v. Williams*, 4 Ired. (N. C.) 400; *Com. v. Colton*, 8 Gray 488; *Megowan v. Com.*, 2 Met. (Ky.) 3; *Neuendorff v. Duryea*, 69 N. Y. 557; *Peo-*

ple v. Hoym, 20 How. Pr. 76; *Lindenmuller v. People*, 33 Barb. 548; *McGatrick v. Wason*, 4 Ohio St. 566; *Piqua v. Zimmerlin*, 35 Id. 507; *Com. v. Wolf*, 3 S. & R. 48; *Specht v. Com.*, 8 Penn. St. 312; *City Council v. Benjamin*, 2 Strob. (S. C.) 508; *Gabel v. Houston*, 29 Tex. 335; *Elsner v. State*, 30 Id. 524; *Bohl v. State*, 3 Tex. App. 683; *Swann v. Swann*, 21 Fed. Rep. 299.

Sunday laws are upheld both as a protection to public morals and as establishing a needed sanitary regulation. In *Ex parte Andrews*, 18 Cal. 678, the argument is well stated: "The duty of government comprehends the moral as well as the physical welfare of the state; and in this instance it is asserted on behalf of this law that the passage of it is essential to the welfare of the people, both moral and physical. It is claimed that from physical causes men require respite from intellectual and physical labor, in the proportion of one day's rest in seven; and that a law which enjoins this is not only for the aggregate good of the society, but for the benefit of all the members. It is said that the labor of six days, with this relaxation, is more productive in the long run than the uninterrupted labor of the week. It is said, besides, that this law affords, indirectly, protection against oppression to employees, women, apprentices and servants, and that but for the law, men would keep open stores and shops, because their neighbors did so, and that by competition a sort of compulsion exists to violate 'the laws of health.'"

The Supreme Court of Ohio, in *McGatrick v. Wason*, 4 Ohio St. 566, upheld Sunday laws as a sanitary regulation purely. In that case, THURMAN, C. J., said: "The act does not to any extent rest upon the ground that it is

immoral or irreligious to labor on the Sabbath any more than upon any other day. It simply prescribes a day of rest from motives of public policy and as a civil regulation." See also Pennsylvania cases cited, *supra*.

On the other hand in *Lindenmuller v. People*, 33 Barb. 548, much stress is put upon the argument that Sunday laws are a protection to public morals. The court said: "The belief of no man can be constrained, and the proper expression of religious belief is guaranteed to all; but this right, like every other right, must be exercised with strict regard to the equal rights of others; and when religious belief or unbelief leads to acts which interfere with the religious worship and rights of conscience of those who represent the religion of the country, as established not by law, but by the consent and usage of the community, and existing before the organization of the government, their acts may be restrained by legislation, even if they are not indictable at common law."

Judge COOLEY seems to regard this latter ground as the more tenable argument in favor of Sunday laws: Const. Lim. 477. Though it would seem that his objection to the argument based upon the necessity of one day's rest in seven, as having no proper application to those who conscientiously observe the seventh day of the week, is much weakened if we consider that by uniformity alone in the day observed can the institution be properly preserved and the rights of employees and others protected: *Ex parte Andrews*, *supra*; *Lyon v. Strong*, 6 Vt. 219.

It is clear on authority that Sunday laws, which do not provide that the seventh day of the week may be observed instead of Sunday by those believing in the sanctity of the former day, are not, for such reason, unconstitutional; and that a conscientious observance of the seventh day is no defence to a violation of such laws: *Frolickstein v. Mayor of*

Mobile, 40 Ala. 725; *Ex parte Andrews*, 18 Cal. 678; *Ex parte Bird*, 19 Id. 130; *Com. v. Hyneman*, 101 Mass. 30; *Com. v. Has*, 122 Id. 40; *Com. v. Wolf*, 3 S. & R. 48; *Specht v. Com.*, 6 Penn. St. 312; *City Council v. Benjamin*, 2 Stroob. (S. C.) 508.

Indeed, in *Shreveport v. Levy*, 26 La. Ann. 671, it was even held that such an exception rendered a city ordinance invalid. And again it was declared in *Simon's Ex'rs. v. Gratz*, 2 P. & W. 412, that the conscientious scruples of a Jew against appearing to prosecute his suit on Saturday was no cause for a continuance.

We cannot conclude the constitutional argument better than in the words of Mr. Bishop: "The institution of the Sabbath, as a day of rest from worldly labor, dear to him who reveres it for its Divine origin, has to the statesman and jurist a significance of a different kind. It is the corner stone of public morality and happiness, viewed merely as of civil regulation. And though the law should not foster any particular sect of religion at the expense of the rest, or even at the expense of him who conscientiously rejects all current forms, still it should not cast off a good thing, beneficial to the entire community, simply because the majority of the people believe it not only to be good, but to be sanctioned also by religion:" 2 Bish. Cr. Law, § 951.

VIOLATION OF STATUTES.—I. Under the English statute of 29 Car. II., which is substantially followed in several states of the Union, "worldly labor, business or work," on Sunday is illegal only when within the "ordinary calling" of the person charged with violating the statute: *Drury v. Defontaine*, 1 Taunt. 131; *Smith v. Sparrow*, 4 Bing. 84; *Bloxsome v. Williams*, 3 B. & C. 232.

And the sale of a horse on Sunday by one who does not commonly deal in horses is not illegal under such a statute: *Fennell v. Ridler*, 5 B. & C. 406; *Amis v. Kyle*, 2 Yerg. (Tenn.) 31. Neither is the standing of a stallion by one not

engaged in that business: *Scarfe v. Morgan*, 4 M. & W. 270. Nor the hiring of a farm laborer: *Rex v. Whitnash*, 7 B. & C. 596.

II. The statutes of many of the states differ from the English statute in omitting the limitation "within their ordinary calling:" and when this limitation is not expressed it is not to be implied: *Bennett v. Brooks*, 9 Allen 118.

The following acts have been held violations of such statutes: The hauling of manure (*Spacht v. Com.*, 8 Penn. St. 312); keeping open store (*Cincinnati v. Rice*, 15 Ohio 225); the sale of liquors (*State v. Ambs*, 20 Mo. 214); loaning money (*Troewert v. Decker*, 51 Wis. 51; *Frost v. Plumb*, 40 Conn. 111); and see cases of Sunday contracts, *infra*.

III. The statutes of other states omit the word "business," and are directed against "common labor" only, or make use of terms of similar import. The following acts have been held to be violations of such statutes: selling one quart of beer: *Voglesong v. State*, 9 Ind. 112; *Eitel v. State*, 33 Id. 201 (criticizing, *Wetzler v. State*, 18 Id. 416); selling one cigar: *Foltz v. State*, 33 Id. 215; selling 400 bushels of corn: *Sellers v. Dugan*, 18 Ohio 489; the ordinary employment of an attorney's clerk: *Watts v. Van Ness*, 1 Hill 76; and see cases on Sunday contracts, *infra*. Gaming is not "common labor:" *State v. Conger*, 14 Ind. 396.

IV. Under the statutes of other states, the act complained of must be "to the disturbance of others," to be illegal: *Clough v. Shepherd*, 31 N. H. 490; *Starr & Curt. Rev. Stat.* Ill. 824.

For cases under yet other statutes, see *Boynton v. Page*, 13 Wend. 425; *King v. Younger*, 5 T. R. 449; *Com. v. Lynch*, 8 Gray 384; *Com. v. Harrison*, 11 I. l. 308.

SUNDAY CONTRACTS.—The making of contracts on Sunday was not prohibited at common law: *O'Rourke v. O'Rourke*, 43 Mich. 58; *Horauk v.*

Keebler, 5 Neb. 355; *Kepner v. Keefer*, 6 Watts 231; *Swisher v. Williams*, *Wright (O.)* 754.

I. Under the statutes of those states providing that the act complained of must be "to the disturbance of others," and also under statutes forbidding "common labor" only, omitting the word "business" and similar terms, the making of contracts on Sunday is not illegal, according to the weight of authority, where the making of such contracts is not the regular business of the party charged with violating the law; *Richmond v. Moore*, 107 Ill. 428; *Johnson v. Brown*, 13 Kan. 529; *Horauk v. Keebler*, 5 Neb. 355; *Bloom v. Richards*, 2 Ohio St. 387. But see *Link v. Clemmens*, 7 Blackf. 477. A previous contract for Sunday advertising is void, under statutes of the latter class; *Smith v. Wilcox*, 25 Barb. 341.

II. Where the statute contains the word "business," or similar terms, Sunday contracts are invalid: *Saltmarsh v. Tut-hill*, 13 Ala. 390; *Dodson v. Harris*, 10 Id. 566; *Pattee v. Greeley*, 13 Met. 284; *Adams v. Hamell*, 2 Doug. (Mich.) 73; *Wight v. Geer*, 1 Root 474; *Towle v. Larrabee*, 13 Shepley (Me.) 464; *Kepner v. Keefer*, 6 Watts 231; *Lovejjoy v. Whipple*, 18 Vt. 379; *Berrill v. Smith*, 2 Miles (Pa.) 402; *O'Donnell v. Sweeney*, 5 Ala. 470; *Hill v. Sherwood*, 3 Wis. 343; *Hill v. Wilker*, 41 Ga. 449; *Bradley v. Rea*, 103 Mass. 188; *Tucker v. Mowrey*, 12 Mich. 378; *Allen v. Deming*, 14 N. H. 133; *Fennel v. Ridler*, 5 B. & C. 406; 1 Swift's Syst. 367. But *contra*, *Reynolds v. Stevenson*, 4 Ind. 619. A previous contract cannot be rescinded on Sunday: *Benedict v. Bachelder*, 25 Mich. 425. An action of deceit in the sale of a horse on Sunday, contrary to law, can not be maintained: *Northrup v. Foot*, 14 Wend. 248; *Robertson v. French*, 12 Met. 24. And the parties to an illegal Sunday contract will be left in *statu quo*: *Myers v. Meinruth*, 101 Mass. 366; *Moore v.*

Kentall, 1 Chand. 33; *Chestnut v. Harbaugh*, 78 Penn. St. 473; *Blakesley v. Johnson*, 13 Wis. 530. But it has been held that a subsequent promise to pay for liquor purchased on Sunday, may be enforced: *Melchoir v. McCarty*, 31 Wis. 252. Though no presumption will be entertained in favor of the ratification of an illegal Sunday contract: *Winfield v. Dodge*, 34 Mich. 355.

A Sunday note bearing date of Monday, is not void in the hands of an innocent purchaser: *Vinton v. Peck*, 14 Mich. 287; *Cranston v. Goss*, 107 Mass. 439; *Knox v. Clifford*, 38 Wis. 651. So it has been said that a Sunday note for an antecedent debt, is good: *Kaufman v. Hamm*, 30 Mo. 387. A note made on Sunday, but delivered on Monday, is valid, and takes effect from date of delivery: *Clough v. Davis*, 9 N. H. 500; *Hill v. Dunham*, 7 Gray 543; *Hilton v. Houghton*, 35 Me. 143; *Dohoney v. Dohoney*, 7 Bush 217; *King v. Fleming*, 72 Ill. 21; *Banks v. Wertz*, 13 Ind. 203; *Com. v. Kendig*, 2 Penn. St. 448; *Lovejoy v. Whipple*, 18 Vt. 379; *Adams v. Gay*, 19 Id. 358. So of an official bond: *Hall v. Parker*, 37 Mich. 590; and of a land-contract: *Lamore v. Friesbee*, 43 Mich. 186. A note made and delivered on a secular day, to take effect on Sunday, is not void: *Stacy v. Kemp*, 97 Mass. 166.

Under the English and similar statutes, Sunday contracts are not void, as "business," unless they be further shown to be "business" "in the ordinary callings of the parties thereto:" *Sanders v. Johnston*, 29 Ga. 526; *Begbie v. Levi*, 1 C. & J. 180.

NECESSITY AND CHARITY.—All of the statutes, we believe, except from their operation cases of "necessity and charity." From the nature of the case, no strict definition of these terms can be given. "The best we can do is to judge of cases as they arise, and to treat them as within the prohibition or the saving clause of the statute according to the spe-

cific features which each presents:" *Com. v. Johnston*, 2 Am. L. Reg. (O. S.) 285, 432, 517.

In *McGatrick v. Wason*, 4 Ohio St. 566, THURMAN, C. J., said: "The necessity spoken of in the statute is not an absolute, uncontrollable necessity only; but may be a necessity created by the exigencies of society or trade." And as was said by PARSONS, C. J., in *Com. v. Knox*, it is sufficient that there be "a moral fitness or propriety" in the act: 6 Mass. 76; *Bennett v. Brooks*, 9 Allen 118.

Yet the above should be considered in connection with the limitation laid down in *Com. v. Johnston*, *supra*: "If we decide that necessity and charity mean convenience * * * we emasculate the statute and sweep away the guard which the legislature threw around not only the morals of society, but the physical health and well being of both men and beasts." See also, *Com. v. Sampson*, 97 Mass. 407.

"In considering what is lawful or fit to be done on the Lord's day 'charity' must include everything which proceeds from a sense of moral duty or a feeling of kindness and humanity and is intended wholly for the purpose of the relief or comfort of another and not for one's own benefit or pleasure. That a visit to a sick child or other relative upon the Lord's day is within the exception is well settled. * * * The same reason extends to the case of a sick friend:" *Doyle v. L. & B. Rd.*, 118 Mass. 195.

The following acts have been declared judicially, to come within the meaning of the various statutes in excepting works of "necessity and charity;" work necessary to prevent spoiling of malt for beer (*Crocket v. State*, 33 Ind. 416); gathering and boiling sap where necessary to save (*Morris v. State*, 31 Ind. 189; *Whitcomb v. Gilman*, 35 Vt. 297); gathering and marketing melons to prevent spoiling (*Wilkinson v. State*, 59 Ind. 416); harvesting "dead ripe" wheat (*Turner v. State*, 67 Ind. 595); remov-

ing logs broken from raft to place of safety (*Parmalee v. Wilks*, 22 Barb. 539); loading a ship in danger (*The Richard Matt*, 1 Biss. 440; *Smith v. Schooner J. C. King*, 10 Pitts. L. J. 274); attending lock on navigable river (*Murray v. Com.*, 24 Penn. St. 270); hiring horse to take prisoner to jail (*Fisher v. Kyle*, 27 Mich. 454); carrying mails (*Com. v. Knox*, 6 Mass. 76); repairing dangerous highway (*Flagg v. Milbury*, 4 Cush. 243); gathering feed for hogs (*Edgerton v. State*, 67 Ind. 588); making bill of sale where necessary to save debt (*Hooper v. Edwards*, 18 Ala. 280); visiting or getting medicine for sick child or friend (*McClary v. Lowell*, 44 Vt. 116; *Gorman v. Lowell*, 117 Mass. 65; *Doyle v. L. & B. Rd.*, 118 Id. 195); visiting parents (*Logan v. Matthews*, 6 Penn. St. 417); servant's driving master's coach to church (*Com. v. Nesbit*, 34 Penn. St. 398); making will (*Bennett v. Brooks*, 9 Allen 118); bringing of servant to master's house to prepare meals (*Crosman v. Lynn*, 121 Mass. 301); loading vessel to avoid close of navigation (*McGatrick v. Wason*, 4 Ohio St. 566; but *contra*, *Pate v. Wright*, 30 Ind. 476); selling one cigar from hotel stand (*Carver v. State*, 69 Id. 61); sale of liquor by innkeeper to guest (*Hall v. State*, 4 Har. (Del.) 132; but *contra*, *Omit v. Com.*, 21 Penn. St. 426; and *Com. v. Barr*, 34 Id. 86); holding spiritualistic meeting (*Feital v. M. Rd.*, 109 Mass. 398); taking subscription to church fund (*Allen v. Duffie*, 43 Mich. 1; *Dale v. Knapp*, 24 Alb. L. J. 432; but see *Cattell v. M. E. Church*, 62 Ind. 365); holding meeting of benevolent society (*People v. Y. M., &c., Soc.*, 65 Barb. 357); letting of carriage for act of necessity or charity (*Myers v. State*, 1 Conn. 502); running street car (*A. & S. Rd. v. Renz*, 55 Ga. 126; but *contra*, *Com. v. Jeandell*, 2 Grant's Cas. 506).

The following acts have been declared not to come within the exception in favor of works of "necessity and charity:"

driving omnibus for common hire (*Com. v. Johnston*, 2 Am. L. Reg. (O. S.) 285, 432, 517); impounding hogs (*Frost v. Hull*, 4 N. H. 153); keeping open barber shop (*State v. Lorry*, 7 Bax. (Tenn.) 95; *Com. v. Jacobus*, 1 Penn. L. Gaz. Rep. 491; *Phillips v. Innes*, 4 Clark & F. 234); cleaning gig (*Leslie v. Mackie*, 32 Am. Rep. 558); cleaning out wheel-pit to avoid stoppage on secular day (*McGrath v. Merwin*, 112 Mass. 467); hoeing crops in need of cultivation (*Com. v. Josselyn*, 97 Mass. 411); gathering seaweed on retired beach, to prevent washing away (*Com. v. Sampson*, 97 Mass. 407); travelling to serve civil process (*Pearce v. Atwood*, 13 Mass. 324); or to conduct legal business (*Bosworth v. Swansey*, 10 Met. 363); or to supply fresh meat (*Jones v. Andover*, 10 Allen 18). And it has been said that the necessity must be real and not fancied: *Johnson v. Irasburgh*, 47 Vt. 28, and cases cited.

LEGAL PROCEEDINGS.—At common law, only judicial proceedings appear to have been forbidden on Sunday, and purely ministerial acts performed upon that day were valid: *Hammons v. State*, 59 Ga. 164; *Weldon v. Colquitt*, 62 Id. 449; *Merritt v. Earle*, 31 Barb. 38; *Story v. Elliot*, 8 Cow. 27; *Clough v. Shepherd*, 31 N. H. 498. Service of civil process on Sunday was void: *Shaw v. Dodge*, 5 N. H. 462.

A verdict is not invalid because returned upon Sunday: *Jones v. Johnson*, 61 Ind. 257; *McCorkle v. State*, 14 Id. 39; *Joy v. State*, Id. 139; *Rosser v. McColly*, 9 Id. 587; *Cory v. Silcox*, 5 Id. 370; *Huidekoper v. Colton*, 3 Watts 56. But this principle has been denied: *Bass v. Irvin*, 49 Ga. 436; *Davis v. Fish*, 1 Greene (Ia.) 410.

Taking bail on Sunday is within the exception, "works of necessity and charity:" *Johnston v. People*, 31 Ill. 469; *Weldon v. Colquitt*, 62 Ga. 449.

CHAS. A. ROBBINS.

Lincoln, Neb.

*U. S. Circuit Court, E. D. of Pennsylvania.*KIDD v. SMITH.¹

A court of equity will not interfere by injunction to restrain a libel calculated to injure property.

The recent English authorities which sustain the right of the courts to grant injunctions against libels, are based upon Acts of Parliament, and not on the general principles of equity jurisprudence.

The existence of malice in publishing the libel, can make no difference in the jurisdiction of the court.

A bill in equity set forth that plaintiff was engaged in the business of making and selling an article under a patent; that defendants, two of whom had been in his employ, engaged in the manufacture and sale of a rival article infringing his patent; that he thereupon filed a bill against them to restrain the infringement, and that pending proceedings in that suit, the defendants maliciously published circulars, containing false and defamatory statements concerning the plaintiff, and concerning the validity of the patent, for the purpose of injuring plaintiff's business. Plaintiff prayed for an injunction to restrain defendants from publishing the aforesaid libel. *Held*, that the court had no jurisdiction to grant such relief.

MOTION for preliminary injunction.

The bill set forth that complainants carried on the business of making a light, known as the Albo-carbon light, under a patent; that the defendants, two of whom had formerly acted as agents for said light, were manufacturing a rival light, known as the Crystal-carbon light; that complainants had filed a bill against defendants, for an injunction, on the ground that the crystal-carbon light was an infringement of the aforesaid patent; that pending that suit, defendants maliciously, for the purpose of injuring complainants' business, published certain circulars containing false and defamatory statements as to complainants' light and the patent under which it was made, and that complainant's business was being damaged thereby, to an extent that was irreparable. Complainants asked for an injunction, restraining defendants from publishing copies of the circulars or making libellous or slanderous statements concerning the business of complainants or concerning the validity of said letters patent, pending the trial and adjudication of the same.

Walter George Smith, Francis Rawle and A. Q. Keasby, for complainants.

E. Clinton Rhoads and F. Carroll Brewster, for respondent.

¹ See note to *Loog v. Bean*, 23 Am. L. Reg. (N. S.) 709.

The opinion of the court was delivered by

BRADLEY, J.—We are asked to grant an injunction in this case, to restrain the defendants from publishing certain circular-letters, which are alleged to be libellous and injurious to the patent-rights and business of the complainants; and from making or uttering libellous or slanderous statements, written or oral, of or concerning the business of the complainants, or concerning the validity of their letters-patent, or of their title thereto, pending the trial and adjudication of the principal suit which is brought to restrain the infringement of said patents.

The application seems to be altogether a novel one, and is urged principally upon a line of recent English authorities, such as *Dixon v. Holden*, L. R., 7 Eq. 488; *Thorley Cattle Food Co. v. Massam*, 14 Chan. Div. 763; *Thomas v. Williams*, Id. 364, and *Herman Loog v. Bean*, 26 Id. 306. An examination of them, and other cases relied on, convinces us that they depend on certain peculiar Acts of Parliament of Great Britain, and not on the general principles of equity jurisprudence.

By the Common Law Procedure Act of 1854 (17 & 18 Vict. c. 125, par. 79, 81, 82), it was provided that, “in all cases of breach of contract, or other injury, where the party injured is entitled to maintain, and has brought an action, he may * * * claim a writ of injunction against the repetition or continuance of such breach of contract or other injury,” &c.; and “in such action, judgment may be given that the writ of injunction do or do not issue, as justice may require,” and further (par. 82), the plaintiff may at any time after the commencement of his action, apply *ex parte* for an injunction.

This statute gave to the judges of the common-law courts, the power to issue injunctions in the cases specified (*i. e.*, breaches of contract or other injury), to prevent a repetition or continuance of the injury for which suit was brought.

By the Judicature Act of 1873 (36 & 37 Vict. ch. 66, par. 17), it was enacted that the High Court of Justice should have and exercise “the jurisdiction which, at the commencement of this act, was vested in, or capable of being exercised by all or any one or more of the judges in (the common-law) courts, respectively, sitting in court or in chancery, or elsewhere, when acting as judges or a judge, in pursuance of any statute, law or custom, and all powers given unto any such court, or to any such judges or judge, by

any statute, and also all ministerial powers, duties and authorities, incident to any and every part of the jurisdiction so transferred."

As the High Court of Justice, established by the Judicature Act of 1873, was an amalgamation of all the courts of original jurisdiction of Westminster Hall, including the Court of Chancery, which became merely one of the divisions of the High Court, it followed that the Court of Chancery became invested with the jurisdiction which was given to the common-law courts, by the Common Law Procedure Act of 1854; and hence became vested with power to grant injunctions to prevent the continuance or repetition of an injury, which was actionable in any court, and for which an action was brought, although the power to grant injunctions in cases of libel, was resisted in several instances by very high authorities, as in the case of the *Prudential Ins. Co. v. Knott*, 10 Ch. App. 142, by Lord Chancellor CAIRNS and Lord Justice JAMES; and in that of *Beddow v. Beddow*, 9 Ch. Div. 89, by Sir GEORGE JESSEL. The practice of issuing such injunctions, however, finally prevailed. This statute law of Great Britain is sufficient to account for the English cases relied on by the complainants, and is undoubtedly the basis on which they really stand.

In the case of *Thorley's Cattle Food Co. v. Mussam*, 14 Ch. Div. 763, a leading case on the subject, MALINS, V. C., says, referring to previous cases: "I think these cases at law establish this * * * doctrine; that where one man publishes that which is injurious to another, in his trade or business, that publication is actionable, and being actionable, will be stayed by injunction, because it is a wrong which ought not to be repeated." This is an evident reference to the Common Law Procedure Act; and other cases expressly refer to the act.

Thus, in the case of *Quartz Hill Consolidated Mining Co. v. Beall*, 20 Ch. Div. 501, as late as 1882, Sir GEORGE JESSEL, says: "This is an appeal from a decision of Vice Chancellor BACON, granting an injunction upon interlocutory application, to restrain the publication of a libel. I have no doubt, whatever, that there is jurisdiction to grant such an injunction. It is plain that the jurisdiction conferred in the common-law courts, by the Common Law Procedure Act of 1854, extended to the granting of such an injunction. The 79th section is as large in terms as can well be, and the 32d section allows *ex parte* injunctions in every case where

a final injunction could be granted, under the 79th section. Of course, under the rule of *omne majus continet in se minus*, if the court can grant an injunction *ex parte*, *à fortiori*, it can grant it on notice. It is, therefore, clear to my mind, that the common-law courts had this jurisdiction in all common-law actions. That jurisdiction is transferred to the High Court, and that would suffice to decide this question of jurisdiction. But, by the Judicature Act of 1873, sect. 25, sub. sect. 8, a larger jurisdiction to grant injunctions than existed before, is given in every case; and in my opinion, that enactment extends the general jurisdiction given in common-law actions, to all actions whether in equity or at common law. The result, therefore, is that there is jurisdiction in a proper case, upon interlocutory application to restrain the further publication of a libel."

But neither the statute-law of this country nor any well considered judgments of the courts, had introduced this new branch of equity into our jurisprudence. There may be a case or two looking that way, but none that we deem of sufficient authority to justify us in assuming the jurisdiction. The authority of the Supreme Court of Massachusetts, in the cases of *Boston Dialite Co. v. Florence*, 114 Mass. 69, and *Whitehead v. Kitson*, 119 Id. 484, is flatly against it. So, also, are the New York cases of the *New York Juvenile, &c., Society v. Roosevelt*, 7 Daly 188; *Brandreth v. Lance*, 8 Paige 24; *Munger v. Dick*, 55 How. Prac. 132; also, the Georgia case of *Caswell v. Central Rd. Co.*, 50 Ga. 70; and the Missouri case of *Life Association of America v. Booger*, 3 Mo. App. 173.

We do not regard the contrary decision in *Croft v. Richardson*, 59 How. Pr. 356, as of sufficient authority to counteract these cases or to disturb what we consider to be the well-established law on the subject. That law clearly is, that the Court of Chancery will not interfere by injunction, to restrain the publication of a libel, as was distinctly laid down by Lord Chancellor CAIRNS, in the case of the *Prudential Assurance Co. v. Knott*, 10 Ch. App. 142, where he says, in reference to an application for an injunction to restrain a libel calculated to injure property: "Not merely is there no authority for this application, but the books afford repeated instances of the refusal to exercise jurisdiction." And then referring to several authorities, "If this decision has since been overruled, it is only because of the enlarged jurisdiction conferred upon the English

Courts, by the statutes referred to. It is a standard authority on the general law, independent of legislation."

We do not think that the existence of malice, in publishing a libel or uttering slanderous words, can make any difference in the jurisdiction of the court. Malice is charged in almost every case of libel, and no case of authority can be found, independent of statute, in which the power to issue an injunction to restrain a libel or slanderous words, has ever been maintained, whether malice was charged or not.

Charges of libel and slander are peculiarly adapted to and require trial by jury, and exercising as we do, authority, under a system of government and law, which, by a fundamental article, secures the right of trial by jury, in all cases at common law, and which, by express statute, declares that suits in equity shall not be sustained in any case where a plain, adequate and complete remedy may be had at law, as has always heretofore been considered the case in cases of libel and slander, we do not think that we would be justified in extending the remedy of injunction to such cases. The application for injunction must be denied, and the auxiliary bill is dismissed with costs.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF ERRORS OF CONNECTICUT.¹

SUPREME COURT OF FLORIDA.²

SUPREME COURT OF ILLINOIS.³

COURT OF ERRORS AND APPEALS OF MARYLAND.⁴

SUPREME COURT OF OHIO.⁵

AGENT. See *Bills and Notes*.

ASSIGNMENT. See *Deed; Gift*.

ATTACHMENT.

Foreign Attachment—Certificate of Stock.—The defendants, residing in the state of Indiana and owning stock in a bank located there, lodged

¹ From J. Hooker, Esq., Reporter; to appear in 53 Conn. Rep.

² From D. C. Wilson, Esq., Clerk. The cases will probably appear in 21 or 22 Florida Rep.

³ From Hon. N. L. Freeman, Reporter; to appear in 117 Ill. Rep.

⁴ From J. Shaaf Stockett, Esq., Reporter; to appear in 65 Md. Reports.

⁵ From Geo. B. Okey, Esq., Reporter. The cases will probably appear in 44 or 45 Ohio St. Reports.

a certificate of the stock, with a blank power to sell and transfer it, with a corporation in this state as collateral security for a loan, its value being considerably in excess of the loan. *Held*, that their equitable interest in the stock could not be reached by the process of foreign attachment in this state: *Winslow v. Fletcher*, 53 Conn.

Suit on Bond—What is “improperly” Suing out Attachment.—An attachment is “improperly” sued out within the meaning of the statute when the plaintiff has no meritorious cause of action of that class in which the statute authorizes this remedy, or having such a cause of action, the ground alleged in the affidavit for its issue is untrue, or not one of the grounds enumerated which must exist before it can be obtained: *Steen v. Ross*, 21 or 22 Fla.

Where the plaintiff has a meritorious cause of action of the class for which an attachment may lawfully issue, and the cause for its issuance is one of those specified in the statute, and such cause is true, a dissolution of the attachment for some mere irregularity in the papers, is not ground for recovery on the attachment bond for “improperly” suing out the attachment: *Id.*

In an action on an attachment bond for “improperly” suing out the attachment, the declaration must state in what the impropriety of the issue of the attachment, within the meaning of the statute, consisted, and it is not sufficient to allege simply that it was improperly issued: *Id.*

ATTORNEY. See *Corporation; Evidence.*

BANK.

Certified Check—Liability thereon—Collection of Check—Negligence.—A bank which certifies a check drawn upon it, is primarily liable for its payment, the same as upon a promissory note or bond given by it: *Drovers' Nat. Bank v. Anglo American Packing and Provision Co.*, 117 Ill.

A bank taking a certified check on another bank, either as a payment, on account, or for the purpose, only, of collection, is entitled to show that the check has availed nothing, when the bank so receiving the same has discharged its duty by an effort to collect it: *Id.*

But if the bank receiving such check, either on account or for collection, sends the same directly to the debtor bank for payment, and the debt is lost in consequence thereof, the bank so transmitting the check must bear the loss: *Id.*

BANKRUPTCY.

Property of the Bankrupt—Subscription Price of Stock of an Incorporated Company—Discharge of Stockholder in Bankruptcy—Actions against Bankrupt for an Unpaid Instalment—Debt not Provable in Bankruptcy.—The law will not compel an assignee in bankruptcy to accept property of the bankrupt which is onerous, and will yield nothing toward the payment of his debts: *Glenn v. Howard*, 65 Md.

Where the subscription price of the stock of an incorporated company, was only to be paid in such instalments, and at such times, as it should be called for by the company, and at the time of the bankruptcy of a stockholder, and for a considerable time thereafter, no call for the payment of his subscription had been made, the discharge in bankruptcy,

under the late bankrupt law of the United States, of such stockholder, is no bar to an action against him for an instalment of his subscription, subsequently called for; the unpaid subscription for the stock not constituting such a debt or liability as was provable against his estate in bankruptcy, under the provisions of the bankrupt law: *Id.*

BILLS AND NOTES. See *Partnership*.

Acceptance by Agent—Liability of Agent—Parol Proof.—The drawee of a bill of exchange, drawn by the "Kanawha & Ohio Coal Co.," was described in the bill as "John A. Robinson, Agt.," and it was accepted by him as "John A. Robinson, Agent K. & O. C. Co." *Held*, that the acceptance so made was the personal obligation of John A. Robinson, and that in a suit upon the acceptance by an endorsee against him, parol evidence was not admissible, in the absence of fraud, accident or mistake, to show that the defendant so accepted the bill, intending to bind the drawer as his principal, and that this fact was known to the plaintiff at the time it became the owner and holder of it: *Robinson v. Kanawha Val. Bank*, 44 or 45 Ohio St.

Promissory Note—Fraud—Burden of Proof—Bona Fide Holder for Value—Knowledge of Facts Impeaching Validity.—If fraud in the procurement of a note be shown, the *onus* is cast upon the plaintiff to show that he paid value for the note before maturity, and under circumstances that created no presumption that he knew of the existence of the facts that impeached the validity of the instrument: *Crampton v. Perkins*, 65 Md.

A *bona fide* holder of a negotiable instrument for valuable consideration, without notice, will be protected against the antecedent equities of the original parties: *Id.*

But actual knowledge of the impeaching facts at the time of taking the paper, notwithstanding value is paid, will defeat recovery on it: *Id.*

Alteration—Effect of—Burden of Proof.—If the acceptor of a bill of exchange allege affirmatively that it has been altered materially and without his authority since he accepted it, the burden is upon him to prove the alleged alteration. The production of the bill will, if the alteration is apparent upon its face, make a *prima facie* case for the acceptor and throw the burden upon the holder to show that the alteration was made before it was accepted. The party producing and claiming under the paper must explain every apparent material alteration and remove every suspicion thereof, of which there is evidence on its face, before he can recover. If there is nothing upon the face of the bill to indicate or to put one on notice as to the alteration, the acceptor must prove it by extraneous testimony: *Harris v. Bank of Jacksonville*, 21 or 22 Fla.

The bill of exchange in question was drawn on a printed blank form, all the blanks being filled in the handwriting of C. F. R., in whose handwriting were also the words "payable at Metropolitan National Bank, New York City." The words "Accepted, James A. Harris," in Harris' handwriting, were in red ink, and the other writing on the paper in black ink: *Held*, that there was apparent, upon the face of the bill of exchange, no alteration, nor any presumptive evidence or reasonable ground for suspicion thereof: *Id.*

CHECK. See *Bank*.

CONSTITUTIONAL LAW.

Insolvent Law—Effect of on Contract with Citizen of another State—Subscription to Corporation.—Where the subscription price of the stock of a company incorporated under the laws of Virginia, was only to be paid in such instalments, and at such times, as it should be called for by the company, and at the time of the insolvency of a stockholder, and of his discharge under the insolvent law of Maryland, no call for the payment of his subscription had been made, such discharge of the stockholder is no bar to an action against him for an instalment of his subscription subsequently called for, even though the unpaid subscription may have constituted, at the time of the discharge of the insolvent, a debt or contract within the meaning of the insolvent law—the insolvent law of this state not operating to discharge a contract made with a citizen or corporation of another state: *Glenn v. Clabaugh*, 65 Md.

Eminent Domain—Taking Land for Cemetery Purposes.—The burial of the dead being a necessity, land may be taken for the purpose under the authority of the state: *Evergreen Cemetery Association v. Beecher*, 53 Conn.

And land taken for such a purpose by a corporation authorized to establish and conduct a cemetery, is taken for public use, if all the public have a right of burial there, even though the expense may operate practically to exclude some: *Id.*

But a corporation does not take land for a public use where the public have not, and cannot acquire, the right to bury in it: *Id.*

Impeaching Validity of Statute—Effect of Journals of Legislature. Where the journal of each house of the general assembly shows that a law received the concurrence of the number of members required by the constitution for its adoption, and that it was publicly signed in the presence of each house by its presiding officer as required by sect. 17, art. 2, of the constitution, its authenticity cannot be impeached by parol evidence that one or more of the members in either house, recorded as concurring in its adoption, had, prior thereto, been seated upon the determination of a contested election, by less than a constitutional quorum, although the concurrence of such member, or members, was necessary to the number of votes required by the constitution for the passage of the law: *State v. Herron*, 44 or 45 Ohio St.

CONTRACT. See *Damages*.

Conditional Acceptance of an offer to Sell—Receipt of a Deposit.—To constitute a contract of sale of land by the acceptance of an offer to sell, the acceptance must be unconditional. No contract will result from a letter in reply, that the party will accept the offer "provided the title is perfect." At any time before an unconditional acceptance of an offer and compliance with its terms it may be withdrawn: *Corcoran v. White*, 117 Ill.

The agents for the owner or party having the power to sell a lot, gave to a party desirous of purchasing the same, a receipt, as follows: "Received of J. H. W., attorney for T. R. C, his check for \$500, as deposit on account of proposed purchase of sub-lot 2, &c., said sum of \$500,

when paid, to apply on said purchase of said lot at \$8000 cash, or to be returned to him in case said sale cannot be perfected, say within sixty days from this date, or in case the title should prove defective, it being understood that we are to forward a deed to the owner of said lot and recommend its execution. *Lyman & Giddings v. Held*, not the evidence of a contract of sale, but only a proposed purchase and agreement of the agents to forward a deed and recommend its execution: *Id.*

COPYRIGHT.

Official Reports of Cases—Right of Judges and Reporter.—The judges and the reporter being paid by the state, the product of their mental labor is the property of the state, and the state has power to take for itself a copyright of it, and it is for the state to say when and in what manner the decisions of the court shall be published: *Gould v. Banks*, 53 Conn.

The taking of the copyright does not offend the rule that judicial proceedings shall be public. The courts and their records are open to all. The reasons given by the judges for their determination in a particular case constitute no part of the record therein; and these are accessible to all who desire to use them in the enforcement of their rights: *Id.*

CORPORATION. See Constitutional Law.

Officers—Power to Employ Attorney—Compromise of Suit—Ratification.—Where the by-laws of a private corporation for pecuniary gain make it the duty of its president to exercise a general supervision over its entire business, and provide that all the property of the company shall be under his control, and such president for a number of years before had acted as its attorney, and looked after its affairs in the courts, this will be evidence of his authority to employ attorneys to appear for the corporation and look after its interests: *Wetherbee v. Fitch*, 117 Ill.

The authority of an attorney to prosecute a suit does not involve authority to compromise it. Before he can compromise the suit he must have special authority for that purpose: *Id.*

Where negotiations by an attorney employed to prosecute an ejectment suit in the name of a corporation, but in fact for the benefit of one of its creditors, for the compromise thereof, were well known to the president and secretary of the company intrusted with its affairs, and they and the attorneys frequently advised as to the suit, and they made no objection to taking a sum in money instead of the land, and the company after the compromise, accepted the benefit of the settlement in the payment of a part of its indebtedness, it was *held*, that its conduct amounted to a ratification of the compromise of its attorneys: *Id.*

CRIMINAL LAW. See Habeas Corpus.

Possession of Stolen Property, as Evidence of Guilt—Explanation of such Possession—Degree of Proof.—It is error for the court, on trial of one for larceny, to instruct the jury that the possession of the stolen property soon after the theft is sufficient to convict, unless such possession is satisfactorily explained, and that an *alibi* must be clearly and satisfactorily proved before that defence can avail: *Hoge v. The People*, 117 Ill.

The burden of proof is on the people to establish a defendant's guilt of the crime charged; and when the defendant charged with larceny introduces evidence to explain his recent possession of the stolen property, and tending to establish an *alibi*, if the jury, after considering the evidence introduced by him as to either or both such questions, in connection with the other evidence, have a reasonable doubt of his guilt, they should acquit: *Id.*

Waters v. The People, 104 Ill. 544, distinguished: *Id.*

DAMAGES.

Breach of Contract of Sale of Personal Property—Market Price.—The rule for the assessment of damages for the breach of a contract for the sale of personal property, is the difference between the market price of the article, if there is a market price, where it is to be delivered, and the contract price: *Equitable Gas Light Co. v. Balt. Coal Tar and Manufacturing Co.*, 65 Md.

If there is no such market price at the place of delivery, and the goods are costly and difficult of transportation from a distance, and are intended to be used for manufacturing purposes, then the market price may be arrived at by deducting the cost of manufacturing and the price of the raw material from the market price of the manufactured article: *Id.*

DEBTOR AND CREDITOR.

Retention of Possession—Taking of Possession before Rights of Creditors Accrue.—A vendee who takes possession at a time subsequent to the sale, but before the rights of creditors have accrued by attachment or otherwise, can hold the property against creditors: *Gilbert v. Decker*, 53 Conn.

The retention of possession raises a presumption of fraud only in favor of attaching creditors or those who stand in their position: *Id.*

The presumption of fraud does not exist in the case of the sale of property exempt from execution: *Id.*

DECEIT.

When Action Maintainable.—The plaintiff alleged in his complaint that as a sub-contractor in the construction of a building for the defendant, he had an inchoate lien on the property for his claim and was about to take proceedings to perfect it, when the defendant, for the purpose of preventing his doing so, falsely represented to him that she had paid the original contractor in full and that nothing was due him; and that the plaintiff, believing the representation, did not perfect his lien and thereby lost it; claiming damages for the false representation: *Held*, on a demurrer to the complaint, that it presented a good cause of action: *Alexander v. Church*, 53 Conn.

And held not to affect the case that it did not appear that the original contractor was irresponsible, nor that a demand had been made on him for payment. The plaintiff was entitled to his lien as security, without reference to his remedy against the original contractor: *Id.*

DEED.

Recording—Priority—Bona Fide Purchaser—Assignee for Benefit of Creditors.—M. made a deed to A. of a house and lot for a valuable con-

sideration. The deed was delivered on the 1st of January 1883, but by oversight was not left for-record until the 19th of March 1884. On the 17th of March 1884, M. made an assignment of all his property for the benefit of his creditors, in consideration of which they executed a general release of all claims and demands against him. This deed was recorded on the day of its date, two days prior to the deed of A.: *Held*, 1st. That the provision of sect. 16, of art. 24, of the code, declaring that where there are two or more deeds conveying the same property, the deed or deeds which shall be first recorded according to law, shall be preferred, if made *bona fide* and upon good and valuable consideration, refers to deeds as between persons who have either paid or advanced money upon the faith of the grantor's actual title to the property transferred, or who have accepted specific property in payment of a specific debt. 2d. That an assignee of all the debtor's property for the benefit of his creditors is not a *bona fide* purchaser within the meaning of the code, even though the creditors have executed a general release of all claims and demands against the debtor in consideration of the assignment: *Tyler v. Abergh*, 65 Md.

Whether if the release had been executed on the faith of the debtor's ownership of the house and lot which he had previously sold, this would have constituted the assignee or the creditors *bona fide* purchasers within the meaning of the code, *Quære? Id.*

Construction—Premises on Bank of River—Canal—Dissolution of Canal Company—Reversion of Fee.—A general deed of premises lying upon the bank of a river, in which is constructed a canal, conveys the grantor's rights to the centre of the stream bounding the property. And to reverse or exclude from the grant any such rights, the conveyance should contain proper words of such reservation or exclusion: *Day v. Pittsburgh, Y. & C. Rd.*, 44 or 45 Ohio St.

Where the canal company, owning and operating such canal, had the right only to use for canal purposes, the bed and waters of such river, on ouster of such company from its corporate franchises and its dissolution by order of this court, the trustees winding up its affairs have no power to convey such rights, but they revert to the proper owners: *Id.*

EQUITY.

Will not aid Party Guilty of Fraud—Qualification of Rule.—Where a debtor understandingly and deliberately conveys away his property to hinder or defraud his creditors, a court of equity will not lend him its aid to recover it back: *Nichols v. McCarthy*, 53 Conn.

But whether a party guilty of an independent fraud in receiving or retaining property upon such a conveyance should be allowed to avail himself of the fact that the conveyance to him was made to defraud creditors, as a defence against a suit to recover the property back, *quære*. The court inclined to the opinion that such a qualification of the rule would be reasonable: *Id.*

EVIDENCE.

Attorney—Privileged Communications.—Instructions by a grantor to an attorney drawing a deed are not ordinarily privileged communications. If the grantor had instructed the attorney to make the conveyance to

the grantee in trust, it would be competent for the attorney to testify that such were the instructions: *Todd v. Munson*, 53 Conn.

Death—Effect of Competency of Witness.—It is only where the suit is upon the cause of action, to which one party is dead, that the other party is excluded, to preserve mutuality: *Horner v. Frazier*, 65 Md.

Where such contract only incidentally arises in another suit, on an other contract and about something else, as matter of evidence touching this suit, the death of one party to it does not close the mouth of the other; but he is a competent witness: *Id.*

EXECUTION. See *Partnership*.

EXECUTORS AND ADMINISTRATORS.

Impounding Share of Devisee to pay Judgment.—Where a testator devises the rest and residue of his estate, after the payment of his debts, among his ten children, equally, the share of each child to be charged with all advances made or to be made to him or her, the administrators with the will annexed have the right, as against the judgment creditors of one of such children, to impound so much of his share, as may be necessary to pay a judgment recovered against such administrators on a bond of such child on which the testator was the surety: *Stieff v. Collins*, 65 Md.

FRAUD. See *Debtor and Creditor*.

FRAUDS, STATUTE OF.

Pleading.—It is not necessary in pleading to allege a promise to which the Statute of Frauds applies, to be in writing. If it appear in the proof, at the trial, to be in writing it is sufficient: *Horner v. Frazier*, 65 Md.

A plea, in addition to the general issue plea, that the promise was not in writing, is an argumentative answer to the declaration, asserting nothing which is not cognizable under the general issue, and is therefore demurrable: *Id.*

Sale of Land—Description.—An agreement for the sale of land under the Statute of Frauds will be held sufficient as to its description of the land to be conveyed, if it so describes a particular piece or tract of land that it can be identified, located or found. A detailed description is not necessary. Where the description shows that a particular tract is within the minds of the contracting parties and intended to be conveyed, parol evidence may be resorted to, to apply the description or identify the tract, though such description be somewhat general: *Lernie v. Clark*, 21 or 22 Fla.

GIFT.

Assignment of Stock—Delivery—Trust.—A father made an assignment under seal to his daughter of certain shares of stock in a corporation. The certificates for this stock at the date of said assignment had been made out in due form in the name of the assignor, but remained in the certificate book of the corporation just as they were executed, and uncut therefrom. The assignment appeared on its face to be for value, but was in fact intended as a gift, and not as a sale. The assignment,

which contained no power of attorney authorizing the transfer of the stock, was left by the assignor with the attorney of the corporation, with whom also was left the book of certificates, with instruction that upon obtaining the assent of a mortgagee of the corporation, the transfer of the stock should be made to the daughter on the books of the company. No transfer, however, was made in the lifetime of the father. On a bill filed by the daughter against the corporation after her father's death, to compel a transfer of the stock, it was *held*, 1st. That the assignment was imperfect without an actual transfer of the stock on the books of the corporation, and equity could not make that good and enforceable as a gift *inter vivos*, which was incomplete, and, therefore, not enforceable at law. 2d. That there was no element of trust in the case upon which the claim of the assignee could be supported. 3d. That if the father had declared that he held, or would thenceforth hold the shares of stock in trust for his daughter, then perhaps equity would seize upon and enforce such trust for the benefit of the donee, although voluntarily created: *Baltimore Retort and Fire Brick Co. v. Mali*, 65 Md.

HABEAS CORPUS.

Use to review Judgment at Law.—The writ of *habeas corpus* does not lie to review a judgment at law, for an alleged error in the proceedings in a case, where the court had jurisdiction of the subject-matter and of the person: *Ex parte Smith*, 117 Ill.

A petition for a writ of *habeas corpus* showed that the petitioner was regularly brought before the grand jury as a witness; that he refused to answer certain questions propounded to him, and that the court thereupon fined him twenty-five dollars, and on refusal to pay the same, ordered him to stand committed to the county jail until the fine and the costs should be paid: *Held*, that if the court erred in imposing the fine, the remedy was by appeal or writ of error, and not by the writ sought. If the order had been simply a committal until the petitioner answered the questions, a different question would be presented: *Id.*

HIGHWAY. See *Negligence*.

HUSBAND AND WIFE.

Alimony.—Suit in Foreign State.—A. and P. were married in West Virginia, at their domicile, where A. retained his domicile, but P. went to Tennessee, where, in *ex parte* proceedings, she obtained a divorce *à vinculo* from A., but, as there was no personal service upon A., her application for alimony was dismissed without prejudice, and to enable her to sue for it, elsewhere. She then brought suit here for alimony alone, and to reach certain property in Ohio belonging to A.; in which case she obtained service upon A., who also appeared and filed pleadings in the case, and on trial the court found sufficient cause, and allowed her alimony: *Held*, P. had a right thus to bring her action for alimony alone, and she could have her claim therefor determined, and, if sustained upon trial, the court could allow her reasonable alimony out of the property of A.: *Woods v. Waddle*, 44 or 45 Ohio St.

INJUNCTION. See *Mortgage*.

INSOLVENT LAW. See *Constitutional Law*.

MORTGAGE.

Personal Property—Destruction by Mortgagor—Injunction.—A court of equity will prevent, by injunction, a mortgagor from impairing the value of, or destroying the property embraced in the mortgage-lien, on which the mortgagee has a right, by virtue of his mortgage, to rely for the security of his debt: *Logan v. Slade*, 21 or 22 Fla.

When a merchant, on the day after the execution of a mortgage on his stock of goods, in favor of some of his creditors, disposes of a large amount of them to other creditors, in payment of their debts, a court of equity is justified in enjoining him from selling said goods otherwise than for cash, and commanding him to pay the proceeds, after deducting expenses of sale, into the registry of the court: *Id.*

If the remedy by injunction as above, proves to be ineffectual, the court may appoint a receiver to take charge of the goods, and dispose of them under its direction: *Id.*

NEGLIGENCE. See *Bank*.

Owner of Factory near Highway—Open Area.—The defendant owned a factory, set back ten feet from the line of a city street, and running along the street, eighty-eight feet, with the space in front, paved like the adjoining sidewalk, and of the same grade. In front of the factory was a porch extending a little way towards the street, with a door in it, used as the main entrance, and by the side of the porch, a depressed area extending along the building, about ten feet long, three feet wide and five deep, with no railing to protect persons from falling in. The plaintiff, on a lawful errand, undertook to go in the evening from the street to the porch, and, without want of care, fell into the open area and was injured: *held*, that the defendant was liable: *Croghan v. Schiele*, 53 Conn.

Where a person has so made the way leading to a building on his premises, as to invite people to pass along the way to such building, he is bound to keep the way clear of dangers: *Id.*

And it is not necessary in such a case, that the person using the way should be a traveller on the highway: *Id.*

OFFICERS.

School Directors—Fraudulent omission to defend Suit—Relief against Judgment.—Persons accepting the position of school directors should not allow their private interest to conflict with public duty; and equity and good faith will require them to defend suits against the district, and protect its property, to the best of their skill and ability, regardless of any private interest they may have: *Noble v. School Directors*, 117 Ill.

Persons were elected school directors of a school district, pending a bill by two of them against the district, seeking to divest the district of property purchased by it, and they discharged the solicitors employed by their predecessors to defend, and interposed no defence whatever, but allowed a decree to pass in their favor against the district by default. It was *held*, that as the decree was obtained by breach of official trust, it should not be binding on the district, and would be set aside on a bill by the district, as being obtained by fraud and breach of duty, and a defence allowed: *Id.*

The rule that denies a party equitable relief against a judgment or decree when he has been guilty of negligence in making a defence, does not apply to the case of public officers, who, for their own private ends, and with selfish motives, allow a judgment or decree to pass against the interests of the public they should represent, for the reason that the public can defend only by and through its proper representatives : *Id.*

PARTNERSHIP.

Power of Partner to sign Note—Non-trading Partnership.—In the case of non-trading partnerships, the individual partners have not the same implied authority as in commercial partnerships, to bind the firm by note, executed in the name of the firm : *Pease v. Cole*, 53 Conn.

In such a case the presumption of want of authority may be overcome by proof of express authority, or of such a state of facts as justly implies authority : *Id.*

These facts may be a course of conduct on the part of the firm, the usage of similar partnerships, the necessities of the business, or a ratification of the act by receiving the benefit of it : *Id.*

A partnership formed for conducting a theatre, is one of the non-trading class : *Id.*

PATENT. See *Payment.*

PAYMENT.

When Voluntary—Purchase of License under worthless Patent.—Where a party with full knowledge, actual or imputed, of the facts, voluntarily without duress, fraud or extortion, pays money upon a demand, though not enforceable against him, he cannot recover it back : *Schwarzenbach v. The Odorless Excavating Apparatus Co.*, 65 Md.

A. relying wholly on the representations of B., made, without fraud, contracted to pay, and did pay B., a fixed sum for the privilege of operating under a certain patent, of which he was the owner. It afterwards turned out that the patent was void ; *held*, that A. could not maintain an action for money had and received, against B., to recover back the money paid under said contract : *Id.*

PLEADING. See *Frauds, Statute of.*

TRADE-MARK.

Use of Person's own Name.—A manufacturer has the right to use his own name as a mark upon his goods, although it be the same name with that of another manufacturer of the same goods, who makes the name a part of his own trade-mark, where there is no false representation in such use ; and the majority of the court regarded the absence of all fraudulent designs and acts established by the finding of facts in the court below : *Rogers v. Rogers*, 53 Conn.

TRUST. See *Gift.*

THE AMERICAN LAW REGISTER.

DECEMBER 1886.

THE PRINCIPLE OF STARE DECISIS.

I. REASONS AND IMPORTANCE OF THE RULE.—The policy of the courts, and the principle upon which rests the authority of judicial decisions as precedents in subsequent litigations, is embodied in the maxim, *Stare decisis et non quieta movere*—to abide by the precedents and not to disturb settled points. Its meaning is, that when a point of law has been once solemnly and necessarily settled by the decision of a competent court, it will no longer be considered open to examination, or to a new ruling, by the same tribunal or those which are bound to follow its adjudications. The reasons which underlie this rule are stated by Chancellor KENT, in a much quoted passage from the Commentaries, as follows: “A solemn decision upon a point of law, arising in any given case, becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to the subject, and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case. If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness; and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it. It would, therefore, be extremely inconvenient to the public, if precedents were not duly regarded and implicitly followed. It is by the notoriety and stability of such rules that professional men can give safe advice to those who consult them;

and people in general can venture with confidence to buy and trust, and to deal with each other. If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of property. When a rule has been once deliberately adopted and declared, it ought not to be disturbed, unless by a court of appeal or review, and never by the same court, except for very cogent reasons, and upon a clear manifestation of error; and if the practice were otherwise, it would be leaving us in a state of perplexing uncertainty as to the law:” 1 Kent’s Comm. 475. And see, as enunciating the same views, *Butler v. Duncomb*, 1 P. Wms. 452; *Goodtitle v. Otway*, 7 T. R. 419; *Selby v. Bardons*, 3 B. & Ad. 17; *Anderson v. Jackson*, 16 Johns. 402; *Bellows v. Parsons*, 13 N. H. 256; *Bates v. Relyea*, 23 Wend. 340; *Jansen v. Achison*, 16 Kans. 358; *Gray v. Gray*, 34 Ga. 499; *Lindsay v. Lindsay*, 47 Ind. 286; *Day v. Munson*, 14 Ohio St. 488; Jones on Bailments 60. So, Judge BLACK referred to the principle of *stare decisis* as, “that great principle which is the sheet-anchor of our jurisprudence:” *Bank of Pennsylvania v. Commonwealth*, 19 Penn. St. 151. And Judge COOLEY observes: “Even if the same or any other court, in a subsequent case, should be in doubt concerning the correctness of the decision which has been made, there are consequences of a very grave character to be contemplated and weighed before the experiment of disregarding it should be ventured upon. That state of things, when judicial decisions conflict, so that a citizen is always at a loss in regard to his rights and his duties, is a very serious evil; and the alternative of accepting adjudged cases as precedents in future controversies resting upon analogous facts, and brought within the same reasons, is obviously preferable:” Cooley, Constitutional Limitations, 50. The principle of *stare decisis*, therefore, though presenting certain analogies to the rule which establishes the conclusiveness of an estoppel by judgment, both rests upon a broader foundation and is more comprehensive in its application. The latter doctrine springs from the two maxims, that “no one should be twice harassed concerning the same dispute,” and that “the interest of the state demands there should be an end of litigation,” and is necessarily limited, in its effect, to the parties to the particular controversy and their privies. But the former is predicated upon the necessity of finally settling the rules of the common law and the interpretation of statutory enactments in the interest, and for the protection and guidance, of the entire commu-

nity; and hence it interposes a barrier to fluctuations of judicial opinion in *all* similar cases.

The importance of a strict but rational adherence to the doctrines of adjudged cases is remarkably exemplified in the growth of English constitutional jurisprudence. To quote from a distinguished writer on public questions: "The principle of the precedent is eminently philosophical. The English constitution would not have developed itself without it. What is called the English constitution consists of the fundamentals of the British polity, laid down in custom, precedent, decisions and statutes; and the common law in it is a far greater portion than the statute law. The English Constitution is chiefly a common-law constitution; and this reflex of a continuous society in a continuous law is more truly philosophical than the theoretic and systematic, but lifeless constitutions of recent France:" Lieber's Civil Liberty.

And in our own country the maintenance of this doctrine is of peculiar importance on account of the deference which we are accustomed to pay to the decisions of the law courts, even in cases where their logical correctness is open to doubt. This recognition of the power and province of the judicial tribunals in the guidance and settlement of our civil institutions, leads the American citizen to yield his implicit obedience to their doctrines even when the decision of a court lays a controlling and shaping hand, not formally, perhaps, but in the necessary deductions from its conclusions, upon the most zealously debated political questions, or the most important affairs of government. Then if progress be desirable, if the growth of the nation, in the perfect development of constitutional government, as well as in the stability of its institutions, be a desideratum, these objects can certainly not be attained by a disregard of the principle of *stare decisis*. Our past history declares this truth with unmistakable voice. For, to appreciate its value, we have only to reflect how seriously the progress of American federalism would have been retarded if the interpretations put upon the Constitution by the Supreme Court, in the formative period of our national career, had been thought open to contradiction by any and every court. Hence, in the construction of statutes and the organic law, whether of a State or of the Union, the rule is almost universal to adhere to the doctrine of *stare decisis* under any and all circumstances: *Seale v. Mitchell*, 5 Cal. 401. And see *Grubbs v. State*, 24 Ind. 295.

II. PROPER LIMITATIONS OF THE DOCTRINE.—The principle of *stare decisis* is subject to certain necessary and proper limitations, which, on the one hand, secure and enhance its practical utility, and on the other hand, prevent its abuse. The more important of these limitations will be discussed in order.

1. *Overruled Cases*.—If a decision has been expressly overruled, either by the same court which rendered it, or by a court exercising appellate jurisdiction, it can of course no longer be cited as a precedent. The latest utterance of the court, on any given point of law, constitutes the authority which is not to be departed from without cause. And the same is true of decisions overruled by necessary implication in a subsequent case. But here it would be necessary to show beyond reasonable cavil, that the two authorities were really and necessarily inconsistent rulings on a state of facts substantially identical. An exception, however, would probably be made in the case of a single decision, probably erroneous, which should overrule a series of previous authorities or unsettle the established principles of commercial or statutory law. See *Aud v. Magruder*, 10 Cal. 282. And if a rule of law has been changed by legislative enactment, the authorities which announced it are of course stripped of all binding force: *Lemp v. Hastings*, 4 Greene (Iowa) 448.

2. *Two Extremes to be avoided*.—"That doctrine," says LOWRIE, J., speaking of the rule under consideration, "though incapable of being expressed by any sharp and rigid definition, and therefore incapable of becoming an institute of positive law, is among the most important principles of good government. But like all such principles, in its ideal it presents its medial and its extreme aspects, and is approximately defined by the negation of its extremes. The conservatism that would make the instance of to-day, the rule of to-morrow, and thus cast society in the rigid moulds of positive law, in order to get rid of the embarrassing but wholesome diversities of thought and practice that belong to free, rational, and imperfect beings; and the radicalism that, in ignorance of the laws of human progress and disregard of the rights of others would lightly esteem all official precedents and general customs that are not measured by its own idiosyncrasies; each of these extremes always tends to be converted into the other, and both stand rebuked in every volume of our jurisprudence. And the medial aspect of the doctrine stands everywhere revealed as the only practical one.

Not as an arbitrary rule of positive law, attributing to the mere memory of cases higher honor and greater value than belong to the science and natural instinct and common feeling of right; not as withholding allowance for official fallibility, and for the changing views, pursuits and customs that are caused by, and that indicate an advancing civilization; not as indurating, and thus deadening the forms that give expressions to the living spirit; not as enforcing 'the traditions of the elders,' when they 'make void the law' in its true sense; nor as fixing all opinions that have ever been pronounced by official functionaries; but as yielding to them the respect which their official character demands, and which all good education enjoins:" *Callender v. Keystone Mut. Life Ins. Co.*, 23 Penn. St. 474.

3. *Decision manifestly Erroneous*.—Hence, in the third place, if a decision is clearly incorrect, whether from a mistaken conception of the law or through a misapplication of the law to the facts, and no injurious results would be likely to flow from a reversal of it, and especially if it is injurious and unjust in its operation, it is not only an allowable departure from precedent, but the imperative duty of the court, to reverse it: *Linn v. Minor*, 4 Nev. 462; *Paul v. Davis*, 100 Ind. 422; *Sydnor v. Gascoigne*, 11 Tex. 449. BLACK, C. J., says: "Of course I am not saying that we must consecrate the mere blunders of those who went before us, and stumble every time we come to the place where they have stumbled. A palpable mistake, violating justice, reason and law, must be corrected, no matter by whom it may have been made. There are cases in our books which bear such marks of haste and inattention that they demand reconsideration. There are some which must be disregarded because they cannot be reconciled with others. There are old decisions of which the authority has become obsolete, by a total alteration in the circumstances of the country and the progress of opinion:" *McDowell v. Oyer*, 21 Penn. St. 423. But from this rule is to be excepted the case of a settled and established rule of property, founded upon a series of erroneous decisions. It is only upon serious considerations that the court will overturn such a rule, no matter how incorrect the previous authorities. This point will be discussed in another connection.

4. *Isolated Cases*.—A single decision upon any given point of law is not regarded as conclusive as a precedent in the same degree that a series of decisions upon that point would be: *Duff v. Fisher*,

15 Cal. 375; Wells on Res Adjudicata, sects. 589, 599. And the Supreme Court of California declares that the doctrine of *stare decisis* will lead it to conform to a principle of mercantile law established all over the world, rather than to follow a decision of its own made a few years before, which is a very decided and probably injudicious innovation upon that principle: *Aud v. Magruder*, 10 Cal. 282.

5. *Obiter Dicta*.—The maxim *stare decisis* contemplates only such points as are actually involved and determined in a case, and not what is said by the court or judge outside of the record, or on points not necessarily involved therein. Such expressions, being *obiter dicta*, do not become precedents: *Cohens v. Virginia*, 6 Wheat. 399; *Ex parte Christy*, 3 How. 322, dissenting opinion of CATRON, J.; *Peck v. Jenness*, 7 How. 612. Thus Mr. Justice CURTIS observes: "If the construction put by the court of a state upon one of its statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought into question, then, according to the principles of the common law, an opinion on such a question is not a decision. To make it so, there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties and decide to whom the property in contestation belongs." *Carroll v. Carroll*, 16 How. 286. But this limitation is itself to be taken with a limitation. Thus, although a point may not have been fully argued, yet the decision of the court upon it cannot be considered *obiter dictum*, when the question was directly involved in the issues of law raised by demurrer, and the mind of the court was directly drawn to and distinctly expressed upon the subject: *Michael v. Morey*, 26 Md. 239; *Alexander v. Worthington*, 5 Id. 488; Wells on Res Adjudicata, sect. 382. So an expression of opinion on a point involved in a case, argued by counsel, and deliberately passed upon by the court, is not necessarily *obiter dictum*, although not essential to the disposition of the case: *Buchner v. Railroad*, 60 Wis. 264. Thus, when the record fairly presents two points upon the merits in a case, upon either of which the appellate court might rest its decision, and the court actually decides both, without indicating that it is intended to rest the judgment upon one rather than the other, the decision upon neither can be regarded as *obiter dictum*: *Starr v. Stark*, 2 Sawyer 603. And when judicial decisions may fairly be presumed to have been acted upon as a rule of property, they

should be upheld, not only as to points necessarily involved and decided, but also as to the principles declared to have been established by them in subsequent cases; *Matheson v. Hearin*, 29 Ala. 210.

6. *Illustration and Arguments*.—The language of a decision is to be construed not as a statement of abstract propositions without limitation, but in connection with the particular facts of the case and the specific matters had in view when the language was used, and when applied to an essentially different state of facts, is to be understood as subject by implication to many limitations and restrictions not expressly stated: *Holcomb v. Bonnell*, 32 Mich. 6; *Pass v. McRae*, 36 Miss. 143. Consequently, it is not enough to satisfy the maxim that the particular doctrine or rule for which an authority is cited is mentioned or formulated in it. The process of reasoning, the illustrations, arguments, analogies, or references found in the opinion of the court are not authority or precedent, but only the points arising in the specific case and which are decided by the court: *Lucas v. Commissioners*, 44 Ind. 524; Wells, *op cit.*, sects. 583, 584. But such illustrations and arguments may be, and frequently are, used to show the grounds on which a doctrine rests, or to differentiate the particular authority from another case or line of cases.

III. THE RULE AS BETWEEN DIFFERENT COURTS OF THE SAME STATE.—The opinions of the court of last resort, in any state, upon the points in judgment, presented and passed upon in the cases brought before it, are the law of the land until overruled, and inferior courts are bound to obey them: *Attorney-General v. Lum*, 2 Wis. 507. The opinion of a Nisi Prius court, though, perhaps, admissible as persuasive evidence of the principle contended for, is of course, not binding as a precedent upon the appellate court; except in one instance, viz.: that the Supreme Court will adopt the construction placed by an inferior court upon its own rules of practice: *Mix v. Chandler*, 44 Ill. 174. The decisions of the chief appellate court of a territory, before its erection into a state, or of the Supreme Court of a state prior to the adoption of a new constitution, will be recognised and followed by its successor under the new system, unless manifestly erroneous: *Doolittle v. Shelton*, 1 Greene (Ia.) 272; *Emery v. Reed*, 65 Cal. 351. Two or more decisions concurring on the same point, made by the co-ordinate branches of the same court, in different districts, should be recognised as prece-

dents in the other districts, until reversed by a higher authority: *Andrews v. Wallace*, 29 Barb. 350; *Bentley v. Goodwin*, 38 Id. 633. But when there is a conflict of decisions on a given point, among the tribunals of equal rank in a state, a court in which the point has been decided upon mature deliberation, should adhere to its decision until overruled by a court of last resort: *Greenbaum v. Stein*, 2 Daly 223.

IV. AS BETWEEN FEDERAL AND STATE COURTS.—The decisions of the Supreme Court of the United States, upon the construction of the Federal Constitution or the laws of the Union, are conclusive and binding upon all the state tribunals; both because the interpretation of the organic law and the statutes of the nation properly belongs to its own judiciary, and because that court exercises a certain appellate jurisdiction, in these matters, over the courts of last resort, in the several states: *Black v. Lusk*, 69 Ill. 70; *Lebanon Bank v. Mangan*, 28 Penn. St. 452. But it is said that a court of Common Pleas should follow the decisions of its own Supreme Court, though opposed to the doctrines held by the federal judiciary, inasmuch as there can be no appeal to the Supreme Court of the United States, except from the court of last resort: *Commonwealth v. Monongahela Nav. Co.*, 2 Pears. (Pa.) 372.

The converse of this rule is equally true. The federal courts will uniformly adopt the decisions of the state tribunals in the construction of their statutes or constitutions; and the interpretation given to a law of a state by its highest judicial tribunal, is regarded, in the federal courts, as a part of the statute, and is as binding upon them as the text; *Leffingwell v. Warren*, 2 Black (U. S.) 599; *Smith v. Kernochen*, 7 How. 198; *Christy v. Pridgeon*, 4 Wall. 196; *Nichols v. Levy*, 5 Id. 433; *Williamson v. Suydam*, 6 Id. 723; *Randall v. Brigham*, 7 Id. 523; *Morgan v. Town Clerk*, Id. 610; *Boyle v. Arledge*, 1 Hempst. 620. Thus, on the question of whether a state tax law conforms to the state constitution, the federal courts are bound by decisions of the state court of last resort: *Dundee Mortgage Co. v. Parrish*, 24 Fed. Rep. 197. But there is one exception to this rule, viz.: when the constitutional enactment or statute is alleged to be in violation of the federal constitution or laws, the Supreme Court will be at liberty to put its own construction upon it; for example, when the act in question is objected to as contravening the constitutional prohibition of legislation impairing the obligation of contracts, the court will ascertain

for itself, independently of the state decisions, whether a contract in fact exists, and whether the statute has the effect attributed to it: *Jefferson Branch Bank v. Skelly*, 1 Black (U. S.) 436; *Louisville, &c., Rd. v. Palmes*, 109 U. S. 244. And on questions of interstate extradition, it is said, the decisions of the state courts do not conclude the federal courts: *Ex parte Roberts*, 24 Fed. Rep. 132. Where the rulings of the state court upon the construction of its constitution or laws have been subject to changes of opinion, the federal courts will, in general, follow the latest settled adjudications. But where a question was once definitely settled by a series of decisions in the state court, such decisions being sustained by reason and authority, and one or two later cases overrule them, against all law and reason, the Supreme Court will not feel itself bound to follow every oscillation of opinion: *Gelpcke v. Dubuque*, 1 Wall. 175. And where the United States Circuit Court, in a particular case, adopts the construction of a state statute, put upon it by the highest courts of the state, and afterwards the state courts overrule the former decisions and interpret the statute differently, this will not authorize a reversal of the judgment of the Circuit Court: *Morgan v. Curtenius*, 20 How. 1. So, where the Supreme Court of the United States has maturely adopted the construction placed by the state court on the statutes of the state, and the latter court afterwards gives a different interpretation of the same act, it is deemed more respectful to the supreme national court for the circuit courts to adhere to its decision, rather than to adopt the latest ruling of the state court, until the question shall be again reviewed: *Neal v. Green*, 1 McLean 18.

But in questions of general commercial law, the state adjudications, though entitled to great respect, do not furnish a binding rule of decision for the federal courts; and, conversely, the state courts, in such matters, are not concluded by the rulings of the national courts: *Supervisors v. Schenck*, 5 Wall. 772; *Towle v. Forney*, 14 N. Y. 423. Thus, although the rule that the law of the place where a contract is made will ordinarily govern its interpretation, applies to endorsements of negotiable paper, yet when that law is the common law or law merchant, the question as to what such law is, will not be concluded by the decisions of the highest courts of the state where the endorsement is made, suit being brought in a different jurisdiction: *Franklin v. Twogood*, 25 Ia. 520. And in such a question as this, the federal courts are not bound by the

adjudications of the state within whose borders they sit ; *National Bank of Worcester v. Lock-Stitch Fence Co.*, 20 Reporter 235. So, a decision of a state court, involving only the general principles of equity jurisprudence, is not binding as authority on the federal courts : *Neves v. Scott*, 13 How. 268 ; *Russell v. Southard*, 12 Id. 139.

It has been suggested, with much wisdom and candor, that as commercial law is national in its character, a paramount authority ought to be attributed to the decisions of the highest national tribunal, when dealing with such questions, in order to secure uniformity : *Stoddard v. Railroad*, 5 Sandf. 180. If such an idea were practicable, it would certainly contribute largely to an increase of harmony and certainty in our judicial reports.

V. AS BETWEEN COURTS OF DIFFERENT STATES.—Rulings made under a similar legal system, prevailing in another state, may be cited and respected for their reasons, but are not necessarily to be accepted as guides, except in so far as those reasons commend themselves to the judicial mind : *Caldwell v. Gale*, 11 Mich. 77 ; *Boyce v. St. Louis*, 29 Barb. 650. The decisions of another state, however, would doubtless be accepted as authoritative guides, in cases where a construction of the statutory law of such state became necessary. But the opinion has been expressed, that they would be persuasive, but not conclusive as to such construction, where the statutes in question, but not the decisions, are put in evidence : *Nelson v. Goree*, 34 Ala. 565.

VI. VALUE OF THE ENGLISH DECISIONS.—“Great Britain and the thirteen original states had each substantially the same system of common law originally, and a decision now by one of the higher courts of Great Britain as to what the common law is upon any point, is certainly entitled to great respect in any of the states, though not necessarily to be accepted as binding authority any more than the decisions in any one of the other states upon the same point. It gives us the opinions of able judges as to what the law is, but its force as an authoritative declaration must be confined to the country for which the court sits and judges. But an English decision before the Revolution is in the direct line of authority :” Cooley’s Constitutional Limitations 52. And see *Chapman v. Gray*, 8 Ga. 341 ; *Koontz v. Nabb*, 16 Md. 549. And in California it is said that, in a case arising for the first time in that juris-

diction, the common-law rule of the case will not be disregarded and a new rule created, merely because the English judges have frequently regretted the adoption of the rule ; such a course would be an usurpation of power by the judiciary: *Johnson v. Fall*, 6 Cal. 359.

VII. STATUTES OF ONE STATE RE-ENACTED IN ANOTHER.—Where a particular statute or clause of the constitution has been adopted in one state from the statutes or constitution of another, after a judicial construction had been put upon it in such last-mentioned state, it is but just to regard the construction as having been adopted along with the words, and all the mischiefs of disregarding precedents would follow as legitimately here as in any other case: *Commonwealth v. Hartnett*, 3 Gray 450 ; *Bemis v. Becker*, 1 Kans. 226 ; *Cooley, op. cit.* 52. But it does not necessarily follow that the prior decision construing the law must be inflexibly followed, since the circumstances in the state adopting it may be so different as to require a different construction: *Little v. Smith*, 4 Scam. 402 ; *Gray v. Askeu*, 3 Ohio 479. And the same is in general true of English statutes re-enacted in this country. Thus, Mr. Justice STORY observes : "It is doubtless true, as has been suggested at the bar, that where English statutes—such, for instance, as the Statute of Frauds and the Statute of Limitations—have been adopted into our own legislation, the known and settled construction of those statutes by courts of law, has been considered as silently incorporated into the acts, or has been received with all the weight of authority:" *Pennock v. Dialogue*, 2 Pet. 18.

VIII. PROPERTY RIGHTS NOT TO BE DISTURBED BY REVERSAL OF DECISIONS.—There are some questions in the law the final settlement of which is vastly more important than how they are settled ; and among these are rules of property, long recognised and acted upon, and under which rights have vested. Accordingly, when a principle of law, doubtful in its character or uncertain in the subject-matter of its application, has been settled by a series of judicial decisions and acquiesced in for a considerable time, and important rights and interests have become established under such decisions, the court will hesitate long before attempting to overturn the result, notwithstanding they may think the previous authorities to be entirely erroneous: *Pratt v. Brown*, 3 Wis. 609 ; *Rockhill v. Nelson*, 24 Ind. 422 ; *Harrow v. Myers*, 29 Id. 469 ; *Field v.*

Goldsby, 28 Ala. 218; *Hihn v. Courtis*, 31 Cal. 398; *Emerson v. Atwater*, 7 Mich. 12. In such cases it is better to leave the correction of the error to the legislature, which can control its action so as to make it prospective only, and thus prevent unjust consequences. But these authorities must not be understood as holding that a previous line of decisions affecting property rights can *in no case* be overruled. That would be pushing the doctrine altogether too far. Hence, if it should appear that the evils resulting from the principles established must be productive of greater mischief to the community than can possibly ensue from disregarding the previous adjudications on the subject, a new rule should be created: *Boon v. Bowers*, 30 Miss. 246. "When a rule of property has been once deliberately adopted and declared," say the court, in New York, "it ought not to be disturbed by the same court, except for very cogent reasons:" *Goodell v. Jackson*, 20 Johns. 722. And when a question involving important public or private rights, extending through all coming time, has been passed upon on a single occasion, and when the decision can in no just sense be said to have been acquiesced in, it is not only the right but the duty of the court when properly called on, to re-examine the questions involved, and again subject them to judicial scrutiny: *Pratt v. Brown*, 3 Wis. 603. In the case cited Judge SMITH observes: "We are by no means unmindful of the salutary tendency of the rule *stare decisis*. but at the same time we cannot be unmindful of the lessons furnished by our own consciousness, as well as by judicial history, of the liability to error and the advantages of review."

IX. THE LAW OF THE CASE.—When a case has been decided in the appellate court, and afterwards comes there again by appeal or writ of error, only such questions will be noticed as were not determined in the previous decision; the points of law already adjudicated become the law of the case, and are not to be reversed or departed from in any of its subsequent stages: *Overall v. Ellis*, 38 Mo. 209; *Phelan v. San Francisco*, 20 Cal. 45; *Davidson v. Dallas*, 15 Id. 82. "Nevertheless, if the *facts change* on a second trial of the whole cause, in the court below, after remanding, these may so change the nature of the case as to require a new decision as applicable thereto; and if so, the former decision ceases, under the new development, to be the law of the case. For it is clear that a party on a re-trial *de novo* may introduce new evidence, and establish an entirely different state of facts, to conform to which is

no violation of principle in a court, even if thereby it does set aside its former decision as inapplicable, and adopt a new one as suited to the new phase of the controversy :'' Wells, *op cit.* sect. 619 ; *Yates v. Smith*, 40 Cal. 671 ; *Dodge v. Gaylord*, 53 Ind. 365.

X. AFFIRMANCE BY EQUALLY DIVIDED COURT.—Where the deliberations of the appellate court result in an affirmance of the judgment of the trial court, in consequence of an equal division of opinion among the judges, no binding precedent is thereby established. The judgment in such a case, although it is as conclusive upon the rights of the parties to the litigation as any other would be (*Durant v. Essex Co*, 7 Wall. 107), is not considered as settling the questions of law as to cases which may arise between other parties : *Morse v. Goold*, 11 N. Y. 285 ; *Bridge v. Johnson*, 5 Wend. 342.

H. CAMPBELL BLACK.

Williamsport, Pa.

RECENT ENGLISH DECISIONS.

House of Lords.

ABRATH v. NORTHEASTERN RAILWAY COMPANY.

In an action of malicious prosecution, the burden of proving malice and the absence of reasonable and probable cause is on the plaintiff.

The facts in this case held to warrant a finding of the presence of reasonable and probable cause and the absence of malice on the part of the defendant.

Per Lord BRAMWELL: An action for malicious prosecution does not lie against a corporation aggregate ; such a corporation being incapable of malice or motive.

APPEAL from a decision of the Court of Appeal.

The facts are set out in the report of the case before the Court of Appeal, 11 Q. B. D. 440. For the present purpose the following brief statement will suffice : one McMann recovered from the respondents a large sum as compensation for personal injuries in respect of a railway collision. Information having been given to the company's directors they caused inquiries to be made by the company's solicitor. The results of those inquiries were laid before counsel, who advised that the appellant, Dr. Abrath, should be prosecuted for conspiring with McMann to defraud the company by falsely pretending that McMann had been injured in the collision and by artificially manufacturing symptoms of injury. The respondents accordingly prosecuted appellant, who was acquitted. In an action brought by him

against the respondents for malicious prosecution, CAVE, J., directed the jury that it was for the plaintiff to establish a want of reasonable and probable cause and malice, and that it lay on him to show that the defendants had not taken reasonable care to inform themselves of the true facts of the case, and asked the jury whether they were satisfied that the defendants did take reasonable care to inform themselves of the true facts, and that they honestly believed in the case which they laid before the magistrates. The jury answered both questions in the affirmative, and CAVE, J., entered judgment for the defendants.

The Divisional Court, GROVE and LOPES, JJ., ordered a new trial on the ground of misdirection (11 Q. B. D. 79). The Court of Appeals (BRETT, M. R., and BOWEN and FRY, L.JJ.) reversed this decision and ordered the judgment of CAVE, J., to stand (11 Q. B. D. 440). From this decision the plaintiff appealed.

Sir C. Russell, A. G. and *MacClymont* (*H. Adkins* with them), for the appellant.

Digby Seymour, Q. C., *Sir Henry James*, Q. C., *Gainsford Bruce*, Q. C., and *J. Lawson Walton*, for the respondents were not heard.

EARL OF SELBORNE: My Lords, the argument of the learned counsel for the appellant has cleared up any difficulty which there might have been as to the real grounds on which we should decide this case. The question is really one of the weight of evidence, and nothing else. The burden of satisfying the jury that there was no reasonable and probable ground for the prosecution lies upon the plaintiff. It is not now seriously disputed that it does.

The learned judge having left two questions of fact to the jury, they found, first, that proper care had been used by the prosecutors to inform themselves of the facts; and, secondly, that the prosecutors honestly believed the case which they laid before the magistrates.

In my judgment, the learned judge did not misdirect the jury, and the Court of Appeal were right in their view of the law; and the only question is, is there any ground for saying that upon the weight of evidence, the jury miscarried, and that a new trial ought to be directed? Speaking for myself, I cannot imagine a more hopeless case in that point of view. The railway company had to

determine whether or not they would institute this prosecution ; and the evidence given by the gentleman who was acting for them in the matter is, to my mind, as completely sufficient to negative the idea of the absence of reasonable and proper care on the part of the company to inform themselves of the facts as anything for the purpose of an action of this sort can be.

The statements of certain persons were obtained, carefully considered and laid before counsel, and counsel advised a prosecution upon those materials. A prosecution having been instituted, it was thought by the magistrates, that the preponderance of evidence was such that they ought to send the case for trial. Taking the evidence as it was presented to the railway company, to those who advised them, and to the magistrates, it was a body of evidence which it believed tended to prove the charge, and justified those who believed it in making the charge in perfect good faith. How can it be said that taking such a body of evidence as that, without the suggestion, much less proof of the use of any fraudulent or improper means to obtain it, shows a want of reasonable care on the part of the company to inform themselves about the facts, I cannot imagine. I cannot conceive better *prima facie* evidence of reasonable care in that respect.

[His Lordship then discussed the evidence in detail, and concluded thus:] So far from thinking that there is a preponderance of evidence against reasonable and probable cause, my doubt is rather on the other side, whether on the whole evidence there was really anything to go to the jury in favor of that conclusion.

I move your Lordships that the order appealed from be affirmed and the appeal dismissed with costs.

LORD BRAMWELL: My Lords, I am of opinion that no action for a malicious prosecution will lie against a corporation. I take this opportunity of saying that as directly and peremptorily as I possibly can ; and I think the reasoning is demonstrative. To maintain an action for malicious prosecution, it must be shown that there was an absence of reasonable and probable cause, and that there was malice or some indirect and illegitimate motive in the prosecutor. A corporation is incapable of malice or motive. If the whole body of shareholders were to meet and in so many words to say, "prosecute so and so, not because we believe him guilty, but because it will be for our interest to do it," no action would lie against the corporation, though it would lie against the shareholders who had

given such an unbecoming order. If the directors even, by resolution at their board, or by order under the common seal of the company (I am putting the case plainly in order that there may be no mistake about it), were maliciously, with the view of putting down a solicitor who had assisted others to get damages against them, to order a prosecution against that man, if they did it from an indirect and improper motive, no action would lie against the corporation, because the act on the part of the directors would be *ultra vires*; they would have no authority to do it. They are only agents for the company; the company acts by them, and they have no authority to bind the company by ordering a malicious prosecution. I say, therefore, that no action lies, even if you assume the strongest case, namely, that of the very shareholders directing it, or the very directors ordering it, because it is impossible that a corporation can have malice or motive; and it is perfectly immaterial that some subordinate officer or individual or individuals of the company have such malice or motive. In the case which I put an action would lie against the directors personally who had ordered an improper prosecution. It may be that no action would lie against any subordinate who had malice and who had not ordered or caused or procured the prosecution; because although the two ingredients existed which are necessary for the maintenance of such an action, that is to say, malice and the absence of reasonable and probable cause, yet in the case which I surmise the man would not be a prosecutor; and unless you find the absence of reasonable and probable cause and malice in him who is the prosecutor an action is not maintainable. It is not enough, therefore, to show that there was an absence of reasonable and probable cause, and that the subordinate had malice, not that I for a moment suggest that that is the case here.

In my opinion this is not merely what is commonly called a technical point; although, if a point were untechnical it would be very objectionable. This is a substantial objection; because every one, or every counsel or solicitor listening to me, knows that the only reason why a railway company is selected for an action of this sort, is, that a jury would be more likely to give a verdict against a company than against an individual. Everybody knows it: and perhaps there is a sort of hope of confusion. It is said, "the man was innocent: somebody ought to be punished for it: here is a railway company: there was an improper motive;" and so there is a jumble; the case

gets before a jury, and a railway company is exactly the party to have damages awarded against it. If ever there was a necessity for protecting persons, it is in an action for malicious prosecution, and for two reasons: first of all, a prosecutor is a very useful person to the community. We have something in the nature of a public prosecutor, but everybody knows that the greater number of prosecutions in this country, are undertaken not by the state, but by private persons, or, as in this case, corporations.

One may venture to quote Bentham even upon this matter. He said that laws would be of very little use, if there were no informers, and that it is necessary for the benefit of the public, that people when they prosecute, and prosecute duly, should be protected. There is an additional reason: A man brings an action for malicious prosecution; he gives evidence which shows or goes to show, that he is innocent. You may tell the jury over and over again that that is not the question, but they never or very rarely can be got to understand it. They think that it is not right that a man should be prosecuted when he is innocent, and in the end they pay him for it. It is, therefore, all important that these actions should not be permitted to be brought against persons or bodies, or others who are not properly liable in respect of them.

It may be said, "Well, but this is rather hard upon a man who has been prosecuted, and improperly prosecuted." That is to say, the corporation is innocent but its officers are guilty. But the same thing happens in the case of an individual prosecutor. A man receives false information: he prosecutes upon that information. The person who gave him the information is not liable, because he did not prosecute. He may be liable for the untrue statement, because it may be slander, in the same way as he would be liable if he charged an indictable offence against a person; or possibly, he may be liable for having procured the prosecution; and it may be that in such a case as this, some of the people employed by the company were actuated by an indirect motive; I do not say that they were—it is impossible to say so—but what I say is, that it is no harder upon a man that he has no remedy against a public company that has prosecuted him, when the servants of the company have been malicious, than it is that there is no remedy against any individual man who has prosecuted, he having no malice, but somebody who gave him information, having malice.

It is said that this is an old-fashioned sort of notion. It is: but

this opinion is one that I have entertained ever since I have known anything about the law; and although it is an old-fashioned one, I trust that it is one that will not die out, for the reasons which I have given.

But it is said, "Well, but a variety of actions have been allowed against corporations, which formerly did not exist." I deny it. It is certain that a corporation may order a thing to be done which is a trespass, because there the act of those who act for the corporation, is not *ultra vires*; for instance, take the case of false imprisonment; a railway company gives somebody power to take up persons who, it believes, are doing some wrong to the company. If a person is so authorized, that is an authority which may be unreasonably exercised. You cannot give an authority, maliciously, to prosecute, but you may give an authority to take up persons who are cheating a railway company. If that person to whom authority is given, makes a mistake and takes up a person who is not cheating, it may, in such a case, be said properly to be the act of the company, and they are properly liable. But in that case there is neither malice nor motive, in question. So, also, they may be liable for the publication of a libel. That unfortunate word "malice," has got into cases of actions for libel. We all know that a man may be the publisher of a libel without a particle of malice or improper motive. Therefore, the case is not the same as where actual or real malice is necessary. Take the case where a person may make an untrue statement of a man, in writing, not privileged on account of the occasion of its publication; he would be liable, although he had not a particle of malice against the man. So would a corporation. Suppose that a corporation published a newspaper or printed books, and suppose that it was proved against them, that a book so published had been read by an officer of the corporation, in order to see whether it should be published or not, and that it contained a libel; an action lies there, because there is no question of actual malice or ill-will or motive.

For these reasons, which I dwell upon at no great length, more particularly as Mr. *MacClymont* did not cite any cases upon this point, or go into it at all, I am clearly of opinion that this action does not lie against this company.

But assuming that that difficulty did not exist, there is no absence of reasonable and probable cause in this case. I doubt very much whether *CAVE*, J. needed to have left to the jury, the question,

whether reasonable care had been used. I doubt it very much, indeed. I doubt very much whether he might not have said, I will not say ought not have said to the jury, "If you are of opinion that these directors honestly believed the statements that were laid before them, and honestly acted upon the opinions that were given to them, there was not only no absence of reasonable and probable cause, but it existed in abundance." However, he did put the question, and the jury did answer it: and it does seem to me, I must say, to be one of the strongest cases of an unfounded action, that ever was brought, even for a malicious prosecution.

EARL OF SELBORNE.—My Lords, my noble and learned friend opposite (Lord BRAMWELL) has raised a question which has not been argued before your lordships, a question of the greatest importance, as to whether it is of the essence of an action of this sort that malice should be proved in a sense not imputable to a corporation. The importance of that question would certainly have led me, before I could arrive satisfactorily at an opinion of my own upon it, to desire to have it argued. It has not been argued at your Lordship's Bar. It was not, as far as I can see, a ground of decision in the court below. What has been said by my noble and learned friend I am sure, will have the weight due to all opinions of his whenever the question comes to be solemnly examined; but I do not think that your lordships' decision in the present case can properly be regarded as determining that question.

Order appealed from affirmed; and appeal dismissed with costs.

The position maintained so vehemently by Lord BRAMWELL in this case, that a corporation cannot be liable for torts involving intention, brings this important question once more into prominence. Lord BRAMWELL admits that actions of tort, like trespass or trover, will lie against a corporation; his point is, that a corporation cannot be guilty of torts which involve a wrongful intention, such as deceit or malicious prosecution, because a corporation, being an imaginary person or entity, is incapable of a wrongful intention.

Admitting a general liability in tort on the part of corporations, he denies that a corporation can ever, under any circumstances, make itself liable for a

tort involving intention, even though the entire body of directors or shareholders unanimously order or ratify the tortious act, for the simple reason that it is incapable of any wrongful intention whatever.

Lord BRAMWELL admits that the point discussed by him was not raised in the argument of the case, and he cites none of the authorities bearing upon it. Let us, then, in the first place, see how the views expressed by him stand in the light of precedent, taking up first the English precedents, and then the American.

In *Stevens v. Midland Counties Ry.*, 10 Ex. 352, it was sought to hold a corpora-

tion liable in an action of malicious prosecution. Baron ALDERSON said, "It seems to me that an action of this description does not lie against a corporation aggregate: for, in order to support the action, it must be shown that the defendant was actuated by a motive in his mind, and a corporation has no mind." PLATT and MARTIN, BB., did not decide this point, but held that the corporation was not liable, because its servant who prosecuted did not act within the scope of his authority in so doing.

In *Green v. London General Omnibus Co. (limited)*, 7 C. B. (N. S.) 290, the action was case against a company established for carrying passengers in omnibuses, for maliciously and vexatiously obstructing plaintiff in the carrying on of a similar business. The declaration was demurred to on the ground that a corporation cannot be guilty of an act involving malice or bad intent. But the court say, "we are clearly of opinion that the action lies; and there are abundant authorities to warrant that opinion. The whole course of the authorities from *Yarborough v. Bank of England*, 16 East 6, down to *Whitfield v. Southeastern Ry.*, E., B. & El. 115, which was in reality an action against the Electric Telegraph Company—shows that an action for a wrong will lie against a corporation, where the thing that is complained of is a thing done within the scope of their incorporation, and is one which would constitute an actionable wrong if done by an individual. The doctrine relied on by Mr. Gifford, that a corporation having no soul, cannot be actuated by a malicious intention, is more quaint than substantial.

In *Goff v. Great Northern Ry.*, 3 El. & El. 672, it was held that false imprisonment would lie against a corporation, if the person imprisoning plaintiff had authority from the company to do so. In this case the point discussed by Lord BRAMWELL was not distinctly raised, but BLACKBURN, J., delivering the opinion of the court says, "A railway

company, though it be a corporation, is liable in an action for false imprisonment, if that imprisonment be committed by the authority of the company; and it is not necessary that that authority be under seal."

In *Barwick v. English Joint Stock Bank*, L. R., 2 Exch. 259 (1867), it was held that an action of deceit would lie against a joint stock banking company for the fraudulent misrepresentation or concealment of its manager. The point of the inability of a corporate body to have a wrongful intention was not raised. The court however say: "But with respect to the question, whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong."

In *Western Bank of Scotland v. Addie*, L. R., 1 Sc. App. 145, which was an action by a shareholder to rescind his sharetaking contract, on the ground that he was induced to enter into the contract by the fraudulent misrepresentations of the directors, the court, at p. 157, draw the following distinction: "Where a person has been drawn into a contract to purchase shares belonging to a company by fraudulent misrepresentations of the directors, and the directors, in the name of the company, seek to enforce that contract, or the person who has been deceived institutes a suit against the company to rescind the contract, on the ground of fraud, the misrepresentations are imputable to the company, and the purchaser cannot be held to his contract, because a company cannot retain any benefit which they have obtained through the fraud of their agents. But if the person who has been induced to purchase shares by the fraud of the directors, instead of seeking to set aside the contract, prefers to bring an action for damages for the deceit, such an action cannot be maintained against the company, but only against the directors personally."

See, also, *New Brunswick & Canada Ry. v. Conybeare*, 9 H. L. C. 725.

Moore v. Metropolitan Ry., L. R., 8 Q. B. 36 (1872), follows *Goff v. Great Northern Ry.*, 3 El. & El. 672, *supra*, and holds that a corporation may be liable for a malicious prosecution instituted by its agent.

In the case of *Henderson v. Midland Ry.*, 20 W. R. 23, BRAMWELL, then a Baron of the Court of Exchequer, said, *obiter*, "Further, I am of opinion that this form of action will not lie against a corporation. I cannot understand how malice can exist in a body corporate; a corporation aggregate must necessarily be destitute of malice. The other Barons decline to express an opinion on this point. KELLY, C. B., says: "A railway company must, from time to time, prosecute, and may commit acts of oppression if they are not liable for not prosecuting without reasonable and probable cause; if such be the law, it will require amendment."

Mackay v. Commercial Bank of New Brunswick, L. R., 5 P. C. 394. In this case it was held that an action of deceit would lie against an incorporated bank for the fraudulent misrepresentation of its cashier, made while acting within the scope of his employment. The court advert to and decline to follow the distinction suggested in *Western Bank of Scotland v. Addie*, *supra*, that a corporation is liable in certain cases in contract but never in tort, for the fraud of its servants. The court expressly hold that a corporation may be liable in deceit for the fraud of its servant, if committed while acting within the scope of his employment; and they point out that the words "scope of employment" are used in a far broader sense than "scope of authority," express or implied.

In *Edwards v. Midland Ry.*, 50 L. J., Q. B. 281 (1880), the question whether malicious prosecution would lie against a corporation, was squarely raised. It was argued that the case of *Stevens v. Mid-*

land Ry., *supra*, was a subsisting authority to the effect that a corporation, not being possessed of mind, could not be liable for malicious prosecution which involved mental state. FRY, J., after reviewing the authorities—dwelling especially upon *Whitfield v. South Eastern Ry.*, E., B. & E. 115, and *Green v. London Omnibus Co.*, 7 Com. B. (N. S.) 290, *supra*, came to the conclusion that the *ratio decidendi* of ALDERSON, B., in *Stevens v. Midland Ry.*, *supra*—that a corporation cannot be guilty of a tort involving intention,—had never been followed, and that he was accordingly at liberty to decide according to what he conceived to be the true view of the law. He held that a corporation could be held liable for malicious prosecution. The cases of *Western Bank of Scotland v. Addie*, L. R., 1 Sc. App. 145, and *Mackay v. Commercial Bank of New Brunswick*, L. R., 5 P. C. 394, *supra*, were not noticed.

As the law stands to-day in England, we have the express decision of one learned judge (ALDERSON, B.), that actions of tort involving a wrongful intent will not lie against corporations, supported by the extra judicial opinions expressed by learned judges of the House of Lords in at least three different cases. On the other hand, we have express decisions of several Courts of Appeal in at least five cases, that actions of this nature will lie against corporations. It would seem that the point must be deemed unsettled in England, in the absence of an express decision of the House of Lords, although the preponderance of authority would seem to be in favor of the liability of corporations for torts involving wrongful intents.

In the United States, the law is perfectly well settled that corporations may be held liable for torts involving wrongful intention.

Thus, in *P. W. & B. Rd. v. Quigley*, 21 How. 202, it was held that an action of libel would lie against a corporation. The Court say: "The defendants con-

tend that they are not liable to be sued in this action; that theirs is a railroad corporation, with defined and limited faculties and powers, and having only such incidental authority as is necessary to the full exercise of the faculties and powers granted by their charter; that, being a mere legal entity, they are incapable of malice, and that malice is a necessary ingredient in a libel; that this action should have been instituted against the natural persons who were concerned in the publication of the libel. To support this argument, we should be required to concede that a corporate body could only act within the limits and according to the faculties determined by the act of incorporation, and, therefore, that no crime or offence can be imputed to it. That, although legal acts might be committed for the benefit or within the service of the corporation, and to accomplish objects for which it was created by their dominant body, that such acts, not being contemplated by their charter, must be referred to the rational and sensible agents who performed them, and the whole responsibility must be limited to those agents, and we should be forced, as a legitimate consequence, to conclude that no action *ex delicto* or indictment will lie against a corporation for any misfeasance. But this conclusion would be entirely inconsistent with the legislation and jurisprudence of the states of the Union relative to these artificial persons. Legislation has encouraged their organization, as they concentrate and employ the intelligence, energy and capital of the society for the development of enterprises of public utility. * * * * The powers of the corporation are placed in the hands of a governing body selected by the members, who manage its affairs, and who appoint the agents that exercise its faculties for the accomplishment of the object of its being. But these agents may infringe the rights of persons who are unconnected with the corporation, or who are brought

into relations of business or intercourse with it. As a necessary correlative to the principle of the exercise of corporate powers and faculties by legal representatives, is the recognition of a corporate responsibility for the acts of those representatives:” *Vinas v. Merchants’ Mutual Ins. Co. of New Orleans*, 27 La. Ann. 367; *Samuels v. Evening Mail Co.*, 75 N. Y. 604; *Evening Journal Ass’n. v. McDermott*, 44 N. J. L. 430; *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447; accord.

It is universally held that case for malicious prosecution will lie against corporations: *Fenton v. Wilson Sewing Machine Co.*, 9 Phila. (Pa.) 189; *Goodspeed v. East Haddam Bank*, 22 Conn. 530; *Williams v. Planters’ Ins. Co.*, 57 Miss. 759; *Wheelless v. Second National Bank*, 1 Baxt. (Tenn.) 469; *Boogher v. Life Association of America*, 75 Mo. 319; *Iron Mountain Bank v. Mercantile Bank*, 4 Mo. App. 505; *Copley v. Grover, &c. Sewing Machine Co.*, 2 Woods 494; *Vance v. Erie Rd.*, 32 N. J. L. 334; *Jordan v. Alabama Great Southern Rd.*, 74 Ala. 85; *Ricord v. Central Pac. Rd.*, 15 Nev. 167; *Reed v. Home Savings Bank*, 130 Mass. 443; *Morton v. Metropolitan Life Ins. Co.*, 34 Hun 366; *Krulenitz v. Eastern Rd.*, 5 N. E. R. 500.

The only two cases holding that malicious prosecution will not lie against a corporation because it cannot be guilty of a malicious intent, (*Gillett v. Missouri Valley Rd.*, 55 Mo. 315; and *Owsley v. M. & W. P. Rd.*, 37 Ala. 560), have been expressly overruled by *Boogher v. Life Association of America*, *supra*, and *Jordan v. Alabama Great Southern Rd.*, *supra*, respectively.

The following authorities hold that a corporation is liable in an action of deceit, for the fraudulent misrepresentation or concealment of its servants or agents: *Lamm v. Port Deposit Homestead Ass.*, 49 Md. 233; *Peebles v. Patapasco Guano Co.*, 77 N. C. 233; *Erie City Iron*

Works v. Barber, 106 Penn. St. 125 ; *Butler v. Watkins*, 13 Wall. 456 ; *New York, &c., Rd. v. Schuyler*, 34 N. Y. 30 ; *National Bank v. Graham*, 100 U. S. 699-702 ; *Western Maryland Rd. v. Franklin Bank*, 60 Md. 36.

Having examined the question of liability of corporations for torts, involving intention from the standpoint of authority, let us now discuss it upon logical grounds. It is argued in support of the theory of non-liability of corporations for torts of this class, that a corporation, being an imaginary person, cannot have "intention," because it has no "mind." (See remarks of ALDERSON, B., in *Stevens v. Midland Rd.*, *supra*.) But clearly it must be admitted that corporations are not entirely without mind. A corporation can act, and acting implies mind, purpose, intention. So it seems, that some degree of mind must be ascribed to that fictitious person called a corporation. It may be claimed that a corporation, being created or authorized by law to perform certain functions only, can be regarded as endowed with mind sufficient for the performance of such functions only.

This conception of a corporation is not universally conceded to be the true one : 2 Morawetz Corp. sect., 648, *et seq.* But even admitting it to be the true one, and as a necessary consequence, that a corporation cannot have a bad or wrongful intention, it does not follow that a corporation cannot be guilty of malicious torts in a large class of cases, i. e., where such torts are committed by its servants or agents while acting "within the scope of their employment." There certainly seems no reason why the principle of *respondent superior* should not apply as well where the master is a corporation, as where the master is an individual. And it is perfectly well settled, that it does apply in the case where the master is an individual. Now the theory of *respondent superior* is not that the tortious conduct of the servant is ascribed

to or transferred to the master, but rests on the broad ground of public policy. It is an absolute rule of law creating, in certain cases, a liability on the part of a master for the wrongful act of his servant. This plainly appears from the case of *Sharrod v. Railway*, 4 Exch. 580, where it was held that the act of an engine-driver in running over sheep of the plaintiff, was not the act of the railway company, and that, therefore, the action of trespass would not lie against the company for killing the sheep.

There would seem to be no reason why the principle of *respondent superior* should not apply in the case of torts involving wrongful or malicious intention, as well as in the case of other sorts of torts. Indeed, it seem conceded that it does, and that a master is, in general, liable in tort for the deceit, or fraud or malice of his servants : *Hern v. Nichols*, 1 Salk. 289 ; *Comfort v. Fowke*, 6 M. & W. 358, 373. Conceding, then, that the principle of *respondent superior* does not rest on the theory of imputing the acts of the servant to the master, there would seem to be no reason why a corporation should not be held liable for the torts of its servants, involving malice or wrongful intention.

In this connection we may quote the language of the court of Tennessee in *Whelan v. Second Nat. Bank*, 1 Baxt. (Tenn.) 469, where the court say : " It would be an abandonment of the well-established principle of '*respondent superior*' to hold that the agents of a corporation, in discharge of their duties as such, would be guilty of maliciously instituting suits to the damage of third persons, and yet that the corporation should shield itself from the responsibility by relying on its soulless character."

Also the language of the Supreme Court of Massachusetts, in *Fogg v. Griffen*, 2 Allen 1 : " A corporation can only act through agents. If they, while exercising the authority conferred on them,

are guilty of falsehood and fraud, their principal is liable for the consequences which may flow therefrom. The true test of the liability of the principal in such cases is to ascertain whether, in committing fraud, the agent was acting in the business of his principal. If he was engaged in the course of his employment, then parties injured by his misconduct or fraud can resort for redress to the persons who clothed him with the power to act in their behalf, and who have received the benefits resulting from his agency."

So much for the liability of a corporation for the torts of its servants based on the theory of *respondent superior*. Such liability as we have seen is imposed agreeably to an absolute rule of law based on grounds of public policy, and not upon the theory that the acts and motives of the servants are to be imputed to the master. The acts of the servant, done in the course of his employment, whether tortious or not, are not deemed those of the master. This is true where the master is a corporation just as much as where the master is an individual. It must not, however, be forgotten, that a corporation can act although not through its servants. The instrumentality through which a corporation acts is ordinarily its board of directors, or a meeting of its shareholders. The board of directors is not a servant of the corporation, but is a body authorized to act for the corporation. Its authorized acts are those of the corporation itself. But it can act for the corporation only within the scope

of its authority, and when it acts without the scope of its authority, its acts are no longer those of the corporation. Hence it would seem that where the board of directors directly orders or procures the commission of any tortious act, the corporation cannot be visited with liability therefor. For the tortious act is not that of the company, since it was without the authority of the board, and the principle of *respondent superior* cannot be invoked, since the board of directors is not the servant of the corporation. For this reason it would seem to be true, as Lord BRAMWELL states, "that no action (of malicious prosecution) lies, even if you assume the strongest case, namely, that of the very shareholders directing it, or the very directors ordering it," but not for the reason given by him, "because it is impossible that a corporation can have malice or motive," but because the act of the board of directors was *ultra vires*, and therefore not the act of the company. The same principle would apply to any other sort of tort, just as well as to malicious prosecution. Whether the tortious act ordered by a unanimous vote of the entire body of shareholders would be the act of the corporation, depends upon whether we regard the charter of the corporation as endowing it with its corporate powers, or defining the powers which it may exercise with the sanction of the law. See 2 Morawetz Corp., § 646 *et seq.* See, further, 8 Am. L. Reg. (O. S.) 701.

LOUIS M. GREELEY.

Chicago.

RECENT AMERICAN DECISIONS.

Supreme Court of Vermont.

CLARK v. CLARK'S ADM'R.

An action of assumpsit cannot be sustained for use and occupation of real estate, unless the relation of landlord and tenant exists under a contract express or implied; and a contract will not be implied when neither party expected payment of rent.

An executor, during the settlement of an estate allowed the father of the devisees to occupy lands bequeathed to them, neither party expecting payment, they living with their father, but never having had possession nor the right of possession; *held*, that assumpsit would not lie against their father's estate for the use, and that nothing could be recovered, although the case was tried under a reference.

The relation of parent and child tends rather to rebut than to raise the implication of a contract for rent.

ASSUMPSIT for use and occupation. Heard on a referee's report.

The referee found that the plaintiffs, unmarried young ladies, are the children of L. P. Clark, who died July 12th 1882; that one Wilkins, who deceased in July 1876, bequeathed the use of certain lands to the plaintiffs, another sister and their mother, Frances Clark; that these lands consisted of two farms, on one of which the said Wilkins, at the time of his death, said L. P. Clark, his wife and daughters, lived together as one family; that said Clark and his family continued to live on the farm until his death; that he had the control of both farms, and appropriated the income thereof to himself; that the executor left Clark in the "undisturbed possession" of both farms, and in his settlement of his accounts, in 1883, with the Probate Court, did not account for the rents and profits of said farms; that the amount of debts proved against the estate of Wilkins was \$4540.24, including about \$1700, for which he was liable only as surety of said L. P. Clark.

The said \$1700 having been adjusted in some way, so as to release the estate of said Wilkins, on March 2d 1883, the Probate Court decreed said real estate among the devisees named in the will. In 1877 the executor sold some of said lands, and from the avails of these and the personal property received enough to pay the personal debts of said Wilkins; and the plaintiffs claimed that, as their father received the use of the lands for about five years after the personal debts had been provided for, his estate was liable. It was found that the farm was much improved under Clark's management; that the use of the farm, above improvements and taxes, was \$100 per year; that one of the plaintiffs was generally at home, assisting her parents, and the other taught school, boarding at home for the most part of the time; and that the girls fully earned what they received from their father in the way of support.

E. R. Hard, for defendant.

Lyman E. Knapp and *F. E. Woodbridge*, for plaintiffs.

The opinion of the court was delivered by

Ross, J.—These are actions of assumpsit to recover for the use and occupation of real estate. The facts on which, in our judgment, the cases turn are alike. It is, therefore, needless to allude to the questions presented by the facts in which they differ. It is well settled that to lay the foundation for a recovery in assumpsit for use and occupation of real estate, the relation of landlord and tenant must exist under a contract express or implied: *Stacy v. Vermont Cent. Rd.*, 32 Vt. 551; *Watson v. Brainard*, 33 Id. 83; *Chamberlin v. Donahue*, 44 Id. 57; *Moore v. Harvey*, 50 Id. 297; *Tayl. Land. & Ten.*, sects. 25, 636 and *n.*; *Hough v. Birge*, 11 Vt. 190; *Strong v. Garfield*, 10 Id. 502; *Birch v. Wright*, 1 T. R. 378.

While in *Watson v. Brainard* it is said that in certain cases a contract will be implied from slight circumstances, the general holding in all the decisions is, that when the facts and circumstances are such as to rebut the expectation on the part of both parties of the payment of rent, the court will not imply a contract or promise to pay such rent. Thus, a contract to purchase and occupation under it (*Hough v. Birge, supra*); a contract or other fact inconsistent with the relation of landlord and tenant (*Stacy v. Vermont Cent. Rd., supra*); a suit and judgment in ejectment (*Strong v. Garfield, supra*); occupation in the right of the wife and refusal to acknowledge the owner as landlord (*Chamberlin v. Donahue, supra*); occupation when the plaintiff denies the existence of any contract for the use of the premises (*Moore v. Harvey, supra*)—have each been held not to raise but to rebut the implication of a tenancy or the right to recover rent.

The referee has found that no express contract existed between the respective plaintiffs and the intestate in reference to his use and occupation of the premises; and he is unable to find that either party expected any payment of rent for the occupation by the intestate.

We think this finding, especially in connection with the other facts found in reference to the intestate's occupation of the respective premises, does not raise, but rebuts, the implication of the relation of landlord and tenant, and a contract to pay rent. By the terms of the bequests by which the plaintiffs acquired the right to the use of the premises, the profits arising from the use of the real estate, annually, were to be used by the testator's executor to pay

the balance of his indebtedness that should not be paid from the avails of his personal estate. Until the testator's debts were paid the executor was entitled to the rents. Such debts were not all paid until after the time for which the recovery of rent is claimed.

The debts which the testator incurred as surety for the intestate Clark were proved against the testator's estate, and were debts between the testator and the creditors, which belonged to the testator to pay. The payment of the debt was as much charged by the testator upon the use of the real estate bequeathed as was the payment of the testator's individual debts. There is no fact found that tends to show that the executor surrendered the possession of the lands devised to the devisees, these plaintiffs, at any time before he settled his administration account. Under these facts section 2137, R. L. would seem to be conclusive that the plaintiffs, until the decree of the Probate Court, had no right to the possession of the premises for which they now respectively seek to recover rent. That section reads: "When an executor or administrator is appointed and assumes the trust, no action of ejectment or other action to recover the seisin or possession of land, or for damage done to such land shall be maintained by an heir or devisee until there is a decree of the probate court assigning such lands to such heir or devisee, or the time allowed for paying debts has expired, unless the executor or administrator surrenders the possession to the heir or devisee."

During the time for which the plaintiffs seek to recover rent there was an executor in the active administration of the estate of the testator, charged by the will with the duty to use the rents and profits accruing from the land for the payment of his debts above what might be paid by his personal property; there were debts above what were paid from the personal property remaining unpaid, and nothing to show that the time allowed by the probate court for their payment had expired; and there had been no surrender of the possession of the devised lands by the executor to the devisees. The plaintiffs could not, therefore, during the time for which they claimed to recover rent have recovered the possession of the devised lands. The plaintiffs during that time were never in possession of the devised lands.

It follows logically that, not being at any time in possession, nor by the terms of the will entitled to possession, nor having the right

to recover possession, they cannot during said interval recover rent for the use of said devised lands.

The relation which existed between the plaintiffs and the intestate Clark, that of father and children, all residing harmoniously together on the premises as a family without any accounts being kept or charges made either for support, board or services, and without anything being said between them in regard to the use of said premises; and the manner in which the intestate used and carried on said devised lands, improving the land, building and repairing the buildings, also tend to rebut any implication of the relation of landlord and tenant, or of the payment of rent. Whether a child could recover for the use of its real estate occupied by a parent without an express contract, or circumstances which in law amount to a contract, we have no occasion to consider or decide. We only say that the existence of that relation tends rather to rebut than to raise the implication of a contract for rent. While between the plaintiffs and the intestate, in the way that the executor of Wilkins' estate settled his account with the Probate Court, without requiring the intestate to account for the use of the devised premises for nearly five years, it appears equitable that the plaintiffs should be compensated in some way from their father's estate for such use as has been beneficial to his estate, we are clear that on well-settled principles they, on the facts found, cannot recover for the use of the devised lands before they were legally entitled to the possession of such lands. What might have been their rights against the executor on the settlement of his administration account we have no occasion to consider.

The result is that the *pro forma* judgment of the county court for the plaintiff, in each case, is reversed, and judgment rendered for the defendant to recover his costs. Judgment to be certified to the Probate Court.

The rule announced in the principal case is that which generally prevails both in this country and in England, however unjust and inequitable it may appear. It is an old doctrine and is constantly invoked by the courts, yet a few cases seem to have in a manner repudiated it. The notion that the relation of landlord and tenant must exist between the parties, before the action of use and occupation can be maintained, is the

essence of the doctrine. "Though the law will imply a contract to pay rent from the mere fact of occupation, yet this action lies only where the relation of landlord and tenant subsists between the parties, founded upon agreement, express or implied. But no implication can arise, if there was no tenancy in contemplation between them:" Taylor on Landlord and Tenant, sec. 636; or, as stated in the principal case, when the

facts and circumstances are such as to rebut the expectation on the part of both parties of the payment of rent ; or if the position of the parties to each other can be referred to any other ground than that of a distinct tenancy, no promise to pay rent can be implied as in case of a mere trespasser : *Abbott's Trial Evidence*, 351 ; *Carpenter v. United States*, 17 Wall. 489 ; *Boston v. Binney*, 11 Pick. 1 ; *Holmes v. Williams*, 16 Minn. 164 ; *Mayo v. Fletcher*, 14 Pick. 525 ; *Ackerman v. Lyman*, 20 Wis. 454 ; *Bancroft v. Wardwell*, 13 Johns. (N. Y.) 490 ; *Henwood v. Cheeseman*, 3 S. & R. (Pa.) 500.

"To create the relation of landlord and tenant, an agreement, either express or implied, must exist. Presumptive evidence will not do, such as that the defendant holds over after the expiration of his lease by parol. But the facts must show, expressly or impliedly, that the defendant occupies as tenant of the plaintiff. * * * When a person occupies the land of another, not as tenant, but adversely, or where the circumstances under which he enters show that he does not recognise the owner as his landlord, this action will not lie." *Butler v. Cowles*, 4 Ohio 213.

In *Hurley v. Lamoreaux*, 29 Minn. 138, the suit was for use and occupation of certain premises in the nature of assumpsit. The complaint contained no allegations of any facts showing that the relation of landlord and tenant subsisted between the plaintiff and defendant at the time of the alleged use and occupation. The court held that it failed to state a cause of action, and upon demurrer the suit was dismissed. The court said : "The plaintiff appears to claim that he has framed his complaint upon the theory of waiving a tortious entry and occupation of the premises by defendant, and suing upon an implied contract to pay for use and occupation. One obstacle in the way of this claim is that no tortious entry or occupation is in any

way alleged. But the insuperable answer to it is found in the authorities above cited, which hold, in effect, that a trespasser cannot be converted into a tenant without his consent. In other words, to maintain an action for use and occupation, there must have been an agreement, express or implied, by which the relation of landlord and tenant is created between the parties. Privity of contract between them is indispensable."

In *Edmonson v. Kite*, 43 Mo. 176, 178, suit was brought for the rent, use and occupation of a house, the property of plaintiff. The evidence showed that the defendant did not rent the rooms of plaintiff. Defendant admitted occupancy, but stated that he occupied during the term in pursuance of orders from the military commander of the port. Plaintiff recovered in the trial court, but this judgment was reversed, the Supreme Court holding that the relation of landlord and tenant did not exist between the parties, and therefore no recovery could be had, that a trespasser could not be sued for use and occupation. Other Missouri cases have declared the same doctrine : *Hutton v. Powers*, 38 Mo. 353, 356, where one tenant in common sought to recover from his co-tenant for use and occupation, which was denied : *Cohen v. Kyler*, 27 Mo. 122 ; *Hood v. Mathis*, 21 Id. 308, 313 ; *O'Fallon v. Boismenu*, 3 Id. 405, 408-409 ; *The Aull Savings Bank v. Aull*, 80 Id. 199, 201, where defendant's agent occupied office room in a bank building for about four years ; nothing was said about paying rent and no charges were made therefor on the bank's books ; the action was dismissed : *Doyle v. O'Neil*, 7 Mo. App. 138, 141.

In *Central Mills Co. v. Hart*, 124 Mass. 123, 125, the evidence was, that trustees managing a railroad used, in common with the plaintiff and others, land owned by the plaintiff outside the location of the railroad. It was held, in the absence of any evidence of a demise, that the action could not be sup-

ported against the trustees, whether the use was by permission of the plaintiff or not. The court declared that to maintain the action, something in the nature of a demise must be shown, or some evidence given to establish the relation of landlord and tenant, and which relation could only grow out of contract; that the contract need not be technical and formal, but there must be at least a permissive occupation by the tenant. "Occupation by the tenant, with the assent of the landlord, is indispensable to the maintenance of the action." The court was of the opinion that, if the defendant occupied the premises by mere license of plaintiff—it being revocable at plaintiff's pleasure—so long as it remained executory, and until so countermanded, could only operate as an excuse for trespass, and that if the occupancy was not with plaintiff's permission, then it was a mere trespass and not a demise. "The relation of landlord and tenant in that case would have no existence between the parties." See *Wood v. Wilcox*, 1 Denio 37; *Merrill v. Bullock*, 105 Mass. 486, 490; *Goddard v. Hall*, 55 Maine 579; *Espy v. Fenton*, 5 Oregon 423, where it is said that if the relation of landlord and tenant does not exist, the possession is hostile, and the owner's remedy is by ejectment and for damages.

In *Marquette, &c., Rd. v. Harlow*, 37 Mich. 554, the action was against the railroad company for rent for the use and occupation of lands employed for the track. As there was no evidence of any agreement to pay for the use, the only question of liability arose out of what was claimed to be an implied obligation. The evidence was to the effect that the railroad company entered upon the land without the owner's knowledge or consent, but that afterwards he gave consent to building and grading the road, yet he told the company that it was to gain no rights of the soil; in fact, no rights whatever. The owner never offered to make a deed for the land, and the com-

pany never asked for one. The owner testified that he had repeatedly told the company that it was a trespasser, but had never given it notice to quit. Here it was held that the relation of landlord and tenant could not be inferred from the facts, and as such relation is the basis of the action, resting upon an express or implied agreement to pay rent during the tenancy, which is wanting in this case, the action must fail. See *Dalton v. Laudahn*, 30 Mich. 349; *Hogsett v. Ellis*, 17 Mich. 351.

Moore v. Harvey, 50 Vt. 297, 300, was an action in assumpsit for use and occupation of a certain pasture. Plaintiff testified that he never hired the pasture to defendant; that defendant never agreed to pay for the use of it; that there was no contract whatever, and never had been, in respect to it; that he did not give defendant permission to occupy it. The plaintiff was denied a recovery: *Gallagher v. Himmelberger*, 87 Ind. 63, is an instructive case, and fully sustains the rule of the above authority. See *Wood's Landlord and Tenant*, 6-10; *Stringfellow v. Curry*, 76 Ala. 394; *Newberg v. Cowan*, 62 Miss. 570.

In *Chamberlin v. Donohue*, 44 Vt. 57, the plaintiff and her daughter occupied a homestead left by the plaintiff's husband at his decease, without ever having had the same set out to them by the Probate Court. In the absence of the plaintiff, the daughter married the defendant, and he moved on to the place, and continued to occupy and enjoy it, refusing, on demand, to buy it, or leave it, or pay rent, but offering to let the plaintiff occupy with him, which she declined to do, and the defendant made no contract for the use. The plaintiff finally brought ejectment, which failed for want of notice to quit. In an action in assumpsit for the use and occupation, it was held, that the trial court should have submitted the case to the jury, to find whether or not an implied contract of tenancy existed. In giving the opinion, Ross, J., said:

"To lay the foundation for recovery in assumpsit for use and occupation, the relation of landlord and tenant must have existed between the parties, evidenced by a contract, either express or implied: *Stacy v. Vermont Central Rd.*, 32 Vt. 551; *Watson v. Brainard et al.*, 33 Id. 88; Taylor on Landlord and Tenant, sect. 636. Occupation alone will raise this relation by implication, only when the occupancy of the premises has been with the assent of the owner, and without any act or claim on the part of the occupant, inconsistent with an acknowledgment by the occupant of the owner as his rightful landlord: Taylor on Landlord and Tenant, sects. 636, 637. This implication may be rebutted by proof of a contract, or any other fact inconsistent with the existence of such a relation: *Stacy v. Vermont Rd.*, 32 Vt. 551; Taylor on Landlord and Tenant, sects. 636, 637. A contract to purchase and occupation under it, was held sufficient to rebut this implication of the existence of this relation arising from the occupancy, in *Hough v. Birge*, 11 Vt. 190. A suit and judgment in ejectment has been held to be conclusive evidence that this relation did not exist during the time mesne profits could be recovered in ejectment suit: *Strong v. Garfield*, 10 Vt. 502.

In *Chambers v. Ross*, 25 N. J. L. 293, 294, it is said that, "the law will imply a contract to pay rent from the mere fact of occupancy, unless the character of the occupancy be such as to negative the existence of a tenancy. The action for use and occupation does not necessarily suppose a demise." See *Dean and Chapter of Rochester v. Pierce*, 1 Camp. 467; *Hull v. Vaughan*, 6 Price 157; 2 Saund. Pl. & Ev. 890; Chitty on Contracts 332.

In *Richey v. Hinde*, 6 Ohio 371, it is held that this action lies only where a tenancy is established. The court observed: "In Massachusetts a suit like the present might be supported: 10 Mass.

433; 17 Id. 299. But in England and New York, and in this state, it is settled by authorities too strong to be disregarded, that an action for use and occupation will lie in these cases only where a tenancy subsists: 2 Taunt. 145; 11 Id. 105; 6 Johns. R. 46; 13 Id. 489; 4 Ohio 205. The defendant entered on the land as his own, claiming title; consequently the suit is not sustainable in this aspect."

Peters v. Elkins, 14 Ohio 344, holds that assumpsit for use and occupation will not lie at the suit of a purchaser of mortgaged premises, sold under a decree in chancery, against a tenant in possession under the mortgage.

This action lies where a person enters under an agreement for a term, although he subsequently refuses to accept the lease: *Little v. Martin*, 3 Wend. (N. Y.) 219; or where a tenant holds over after his term has expired, the presumption being that he holds as tenant under the same terms as he held under the lease; *Russell v. Fabyan*, 34 N. H. 218; *Evertsen v. Sawyer*, 2 Wend. (N. Y.) 507; *Abel v. Radcliff*, 13 Johns. (N. Y.) 297.

In *Mercer v. Mercer*, 12 Ga. 421, it is said that a contract to pay rent may be implied from the title of the plaintiff and the occupation of the defendant.

National Oil Refining Co. v. Bush, 88 Penn. St. 335, 340-341, does not seem to harmonize with the general current of authority, but is more in accord with the Georgia case just cited. Here the defendant claimed to hold under a written agreement, the plaintiff denied the agreement and notified the defendant that he would eject him if he did not quit the premises, as he considered him a trespasser. Subsequently the defendant abandoned his occupancy. The question whether or not the defendant was a trespasser was held to have been properly submitted to the jury. The lower court, in instructing the jury, told them that they must find some new contract between the par-

ties, that the presumption that the tenant was a trespasser, arising from the notices, might be rebutted. The Supreme Court, in holding this error, observed : " Such contract was not necessary to the maintenance of the action ; it is not necessarily founded upon a specific contract, written or oral, but upon the use of the premises. The occupant may be, in fact, a trespasser, but the owner of the tenement may waive the trespass

and recover in assumpsit, and it does not lie with the tort-feasor to defeat him by interposing his own wrong. To tell the jury, therefore, that they must find some new contract between the parties, in order to rebut the presumption arising from the notices, was error, for the presumption might well be rebutted by the subsequent acts of the parties.

B. E. BLACK.

St. Louis.

Court of Chancery of New Jersey.

IN RE PERRINE, &c.

A deaf mute who does not understand any matter of business, and cannot be made to understand it, except it may be such as is of the most simple character, and who has no comprehension of business matters, obviously cannot manage his own affairs, and consequently is incapable of selecting an agent to transact them.

ON motion to set aside inquisition.

A. S. Appelget, for the motion.

The opinion of the court was delivered by

RUNYON, Ch.—The inquisition in this case is signed by nineteen of the twenty-four jurors. They find that the alleged lunatic " is of sound mind, and is capable of controlling her property by her own selection of a proper person to act for her." The other five certify that she is " not of sufficient understanding to enable her to manage her property." She is about sixty-five years old, and has never been married. The commissioners have made a report concerning her condition. They say that she is not an idiot or lunatic, in the popular sense of the words ; that she has been a deaf mute ever since she was two or three years old ; that she is ignorant, having never been taught any language, whether spoken or of signs ; that she can neither read nor write, and cannot express to others her understanding, if any she have, of any business transaction ; that she cannot be made to comprehend a business transaction, except, perhaps, a very ordinary one, involving no more money than a dollar or two ; that she has learned to fetch and carry, and to do common, everyday housework,—that is, she can sweep, wash, cook an ordinary meal, &c. ; that it is possible, by rude gestures, to com-

municate to her a desire that she should do such work ; that she has never managed her property, nor any part thereof, and that the acting trustee of her estate has never informed her of the amount, character or income of her property, and that it is doubtful whether she can be so informed ; that she has always been cared for by her near relatives, with whom she has lived—by her mother for about fifty years, and until her mother's death—after her mother's death, by her unmarried sister, so long as that sister lived, and since that sister's death, by her married sister, with whom she now lives. Application is made to set aside the inquisition on the ground that the finding is contrary to the evidence.

Lord HALE says, that a man deaf and dumb from his birth, is, in presumption of law, an idiot ; and the rather, because he has no possibility to understand what is forbidden by law to be done, or under what penalties. He also says, that if it can appear that the man has the use of understanding, which, he adds, many of that condition discover by signs, to a very great measure, then he may be tried, and suffer judgment and execution, though great caution is to be used therein : Hale P. C. 34.

In *Brower v. Fisher*, 4 Johns. Ch. 441, Chancellor KENT said, speaking of such persons : “ Perhaps, after all, the presumption, in the first instance, is that every such person is incompetent. It is a reasonable presumption, in order to insure protection and prevent fraud, and is founded on the notorious fact, that the want of hearing and speech exceedingly cramps the powers, and limits the range of the mind. The failure of the organs requisite for general intercourse and communion with mankind, oppresses the understanding,—*affigat humo divinæ particulam auræ*. A special examination to repel the inference of mental imbecility, seems always to have been required.”

A person born deaf and dumb, but not blind, is not an idiot ; Collin. Lun. 4, sect. 5 ; Shelf. Lun. 4 ; *Brower v. Fisher*, *supra*. But, in order to warrant this court in interfering in behalf of a person to protect him against the consequences of his own mental incompetency, it is not necessary that he should be an idiot or a lunatic. It is enough, if, from any cause, whether by age, disease, affliction or intemperance, he has become incapable of managing his own affairs : 2 Mad. 732 ; 1 Bl. Com. 304 ; *Ridgeway v. Darwin*, 8 Ves. 65 ; *Conover's Case*, 28 N. J. Eq. 330 ; *Lawrence's Case*, Id. 331.

In *Gibson v. Jeyes*, 6 Ves. 267, 273, Lord ELDON says that,
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upon a commission in the nature of a writ *de lunatico inquirendo*, it is not necessary to establish lunacy, but it is sufficient that the party is incapable of managing his own affairs.

It was so held by Chancellor KENT, in *Re Barker*, 2 Johns. Ch. 232, where the person who was the subject of the inquiry had become incapacitated by old age. Whether persons born deaf and dumb are to be treated judicially as persons mentally incompetent to manage their affairs, must depend upon the evidence they are able to give of the possession of capacity.

In *Dickenson v. Blisset*, 1 Dick. 268, a person who was born deaf and dumb, and who had attained to her majority, applied for possession of her real estate, and for an assignment to her of her personal property. Lord Chancellor HARDWICKE, having put questions to her in writing, to which she gave sensible answers in writing, thereupon granted the application,

In *Brower v. Fisher*, 4 Johns. Ch. 441, above cited, a commission was issued to inquire as to the mental competency of such a person.

In the case in hand, the jury found that Miss Perrine was of sound mind, and capable of controlling her property by her own selection of a proper person to act for her. But if the proof was, as the commissioners certify, that she is incapable of understanding the business, or even of receiving any communication upon the subject, and therefore does not understand, and cannot be made to understand, what the necessities of the management of her estate demand, or what an agent is, or what his duties are, or, in other words, if the proof was, as they certify, that she does not understand, and cannot be made to understand, any matter of business, except it may be such as are of the most simple character; if she has no comprehension of business matters,—it is obvious that she is not capable of managing her affairs, and the inquisition cannot be sustained. The jury does not find that she is herself competent to manage her business, but that she is capable of controlling it by an agent of her own selection. But if she cannot be made to understand what the business is, how can she select an agent to manage it?

The inquisition will be set aside.

The cases involving the capacity of deaf mutes are not numerous, and hence the principal case is worthy of careful examination.

In *Christmas v. Mitchell*, 3 Ired. Eq. 541, Mr. Justice NASH, in considering

this question, used the following language: "Formerly, one who was born deaf and dumb was considered, in presumption of law, an idiot: 1 Hale P. C. 34. This presumption of law, if it still exists, like every other presumption, yields

to proof to the contrary, and Lord HARDWICKE decreed an estate to one born deaf and dumb, upon his answering properly questions put to him in writing: *Dickenson v. Blisset*, 1 Dick. 268. But science and benevolence have together rectified the public mind as to such persons; and it is no longer in common understanding any evidence that an individual is an idiot, because deprived from his birth of the power of speech and hearing. No one who has witnessed the wonders worked in modern times, in giving instruction to unfortunates of this class, would, after hearing the testimony in this case, doubt that Leonidas Christmas might have been instructed, not only in the mechanic arts, but that his mind might have been enlightened to receive the high moral obligations of civil life, and the still more profound truths of our holy religion. We are constrained then to say, that he does not come within the exception contained in the statutes"—of limitation as being *non compos mentis*. See, also, *Potts v. Housc*, 6 Ga. 356; *Reynolds v. Reynolds*, 1 Spears 256; *Barnett v. Barnett*, 1 Jones Eq. 222.

The subject is also somewhat considered, with reference to the will of an aged testator whose hearing was somewhat affected, and whose sight was very seriously impaired, in *Weir v. Fitzgerald*, 2 Bradf. 67, by BRADFORD, surrogate, as follows: "By the Roman law no person could make a valid will, who lacked one of the principal senses; such, for example, as were deaf and dumb, or blind. Blackstone lays this down of those born deaf, dumb and blind, who, he says, 'as they have always wanted the common inlets of understanding, are incapable of having *animum testandi*, and their testaments are therefore void.' 2 Com. 497. The rule was of necessity qualified by the reason of it, which was a presumed want of capacity. Persons born deaf and dumb could not make wills on the supposition of insufficient capacity: '*Surdus, mutus, testamentum facere non*

possunt' (Dig. L. xxviii., tit. 1, §§ 6, 7); but subsequently it was allowed, where the defects were not congenital, and there existed sufficient testamentary capacity: Cod. lib. vi., tit. 22, § 10. A blind man might make a nuncupative will by declaring the same before seven witnesses; but he could not make a testament in writing unless it was read to him and acknowledged by him to be his will before witnesses: Cod. lib. vi., tit. 22, § 8; Inst. lib. 2, tit. 12, §§ 3, 4; Dig. lib. xxxvii., tit. 3. This was first permitted by a decree of Justin, and continued to be the rule of the civil law: '*Cæcus, autem, non potest facere testamentum, nisi per observationem, quam lex divi Justin, patris nostri, introduxit.*'

"It has not, however, prevailed in England, nor been incorporated in any of the statutes relative to wills." The object of requiring the will to be read to the blind man was doubtless to prevent fraud, the substitution of one instrument for another, and to secure evidence beyond the mere *factum* of the will, of the knowledge of the contents of the identical will by the testator. It has not been made a formal ceremonial by our statute in any case that the will should be read to the testator in the presence of the witnesses, though it is eminently proper so to do where the testator is blind or cannot read. The statute is satisfied by the subscription of the testator at the end of the will in the presence of two witnesses, or the acknowledgment of such subscription; the testamentary declaration of the testator; and the signature by the witnesses of their names at the end of the will at the request of the testator. These forms are necessary; but, even when satisfied by the evidence, do not always entitle the will to be admitted to proof. Something more is necessary to establish the validity of the will in cases where from the infirmities of the testator, his impaired capacity, or the circumstances attending the transaction, the usual inference cannot be drawn from the mere

formal execution. Additional evidence is therefore required that the testator's mind accompanied the will, that he knew what he was executing, and was cognisant of the provisions of the will. I think that is all that ought to be required in the proof of the will of a blind person. But it is not essential it should be established by the subscribing witnesses. It may be supplied *aliunde*. As subscribing witnesses all that it is necessary they should prove is that concerning which they witnessed and which the statute requires. This satisfies the statute; and the additional evidence to which I have referred as proper in certain cases may be afforded by other persons."

"The point presented is not entirely new. In *Moore v. Paine*, 2 Cas. temp. Lee 595, the deceased was blind, and only one of the three subscribing witnesses proved the instructions, the reading of the will to the testatrix, and her approbation of it. The will was sustained on the ground that only one witness was necessary. In *Longchamp v. Fish*, 5 B. & P. 415, before the Common Pleas, the precise question came up. That was a will of lands, which, by the statute, was required to be executed in the presence of and subscribed by three witnesses. The will was not read over in the presence of the three attesting witnesses. The testator was blind; had dictated the will to one Davis, who read it over to him, took it away, got it copied, brought it back fairly copied; two months after the testator made an alteration in it; and then it was executed. It was contended that the will ought to have been read in the presence of the testator by one, at least, of the three attesting witnesses. The court, however, ruled in favor of the will." See also *Fincham v. Edwards*, 3 Curtis 63.

The leading case of *Brower v. Fisher*, 4 Johns. Ch. 441, decided by Chancellor Kent in 1820, and cited in the principal case, and the cases already cited,

make it clear that a person is not now to be considered an idiot from the mere circumstances of his being deaf and dumb.

If, however, there is still a presumption of some degree of incapacity, civil or criminal, in one who is deaf and dumb, it is quite certain that it may be rebutted by evidence. See, besides the cases already cited, *Commonwealth v. Hill*, 14 Mass. 207; *Morrison v. Leonard*, 3 C. & P. 127; *Rushion's Case*, 1 Leach's Cr. L. 455; *Rex v. Pritchard*, 7 C. & P. 303; *Rex v. Dyson*, Id. 305; *State v. Horria*, 8 Jones Law 140; *Brown v. Brown*, 3 Conn. 303.

Such presumption of quasi incapacity, however, if it still exists, is at most a weak presumption; and, perhaps, it may now be said that there is, at least in the United States, no presumption of a defective understanding in persons deaf and dumb. See *Christmas v. Mitchell*, and *Potts v. House*, *supra*.

But, in order to insure protection and prevent fraud, proof would probably be required that such person was capable of comprehending what he was doing in executing the instrument. See *Weir v. Fitzgerald*, *supra*. To this extent, perhaps, there may be a quasi presumption of incapacity; or, rather the lack of the usual presumption of capacity resulting from the formal execution of the instrument; but this is believed to be the limit of the doctrine. See 1 Redf. on Wills, 3d ed. 53, *et seq.* and notes; 1 Gr. Ev. sect. 366.

Coming now to the more particular consideration of the principal case and applying the principles already stated, there can be no doubt of its correctness. The disability in this case seems to have been much greater than in any of the cases above cited, and to have held that the deaf mute could, in this case, select an agent to manage business, the nature of which she could not be made to understand, would be to stultify the law.

M. D. EWELL.

*Supreme Court of New Hampshire.*KENT v. RAND.¹

The promise of a married woman, made when the common-law disability of coverture existed, does not furnish a consideration upon which her promise to pay the same debt, made after the disability is removed, can be sustained.

ASSUMPSIT, for money had and received by the defendant's intestate, Mary Snow, to the plaintiff's use. Facts found by a referee. In the summer of 1855 Mary Snow, being then a married woman, borrowed from the plaintiff \$275 for the use of her husband in his own business. At that time she had title by deed from her father, of his homestead in Rochester, of which her father held a life lease from her. Her husband died in 1858, her father in 1859, and her mother in 1860. The referee also found facts, which, it was claimed, showed promises by Mary Snow to pay the debt, made on several occasions between 1855 and the time of her death in 1883, while she was sole and the owner of property in her own right, the latest of which was within six years before her death.

Worcester & Gafney, for the plaintiff.

T. J. Smith and *J. G. Hall*, for the defendant.

The opinion of the court was delivered by

SMITH, J.—When the defendant's intestate borrowed the sum of \$275 of the plaintiff, in 1855, she was a married woman. The money was borrowed for the use of her husband in his business, and there is no evidence that it was otherwise used or applied. She had, at the time of the loan, title by deed to her father's homestead in Rochester, subject to her lease to him for the term of his life. It does not appear that she held this property to her sole and separate use, or that the promise made by her to the plaintiff was in respect to her separate property. Her common-law disability, therefore, rendered her contract void: *Bailey v. Pearson*, 29 N. H. 77; *Ames v. Foster*, 42 Id. 381; *Shannon v. Canney*, 44 N. 592; *Hammond v. Corbett*, 51 N. H. 311; *Bachelor v. Sargent*, 47 Id. 262; *Muzzey v. Reardon*, 57 Id. 378; *Read v. Hall*, Id. 482;

¹ See *Bentley v. Lamb*, ante, p. 632, and note.

Messer v. Smyth, 58 Id. 298; *Penacook Savings Bank v. Sanborn*, 60 Id. 558. The question then is, whether assumpsit can be maintained upon her promise to pay the debt, made after the death of her husband; or, in other words, whether a moral obligation to pay money or perform a duty is a good consideration for a promise to pay, or to do the duty.

In a note to *Wennall v. Adney*, 3 Bos. & Pul. 249, is a review of many of the English cases, the result being summed up as follows: "An express promise, therefore, as it should seem, can only revive a precedent good consideration, which might have been enforced at law, through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision." The doctrine of this note is approved in *Smith v. Ware*, 13 Johns. 257; *Mills v. Wyman*, 3 Pick. 207; *Goodright v. Straphan*, Cowp. 201; *Littlefield v. Shee*, 2 B. & Ad. 811; *Meyer v. Haworth*, 8 A. & E. 467; *Eastwood v. Kenyon*, 11 Id. 438; *Jennings v. Brown*, 9 M. & W. 501; and in 1 Pars. on Cont. 432-436.

In *Loyd v. Lee*, 1 Str. 94 (decided in 1718), the facts were these: A married woman gave a promissory note as a *feme sole*, and after her husband's death, in consideration of forbearance, promised to pay it. In an action against her it was insisted that though being under coverture at the time of giving the note, it was voidable for that reason: yet by her subsequent promise, when she was of ability to make a promise, she had made herself liable, and the forbearance was a new consideration. "But the C. J. held the contrary, and that the note was not barely voidable, but absolutely void; and forbearance, where originally there is no cause of action, is no consideration to raise an assumpsit. But he said it might be otherwise, where the contract was but voidable. And so the plaintiff was called."

Lee v. Muggeridge, 5 Taunt. 36 (decided in 1813), a similar case, was decided the other way. The facts were as follows: A married woman, having an estate settled to her separate use, gave a bond for repayment by her executors of money advanced at her request on security of the bond to her son-in-law. After her husband's decease she wrote a letter addressed to the plaintiff, stating "that it was not in her power to pay the bond off, her time here

was short, and that it would be settled by her executors." The plaintiff brought assumpsit on this promise, against her executors, and recovered a verdict. The defendants moved in arrest of judgment, on the ground that no sufficient consideration was shown for the promise. The verdict was sustained upon the ground that a moral obligation is a good cause for a promise to pay.

In *Littlefield v. Shee*, 2 B. & Ad. 811 (1831), the facts were these: The plaintiff's testate in his lifetime, supplied the defendant, a married woman, whose husband was absent, with butcher's meat. After the death of her husband, the defendant promised to pay when it should be in her power, and her ability to pay was proved at the trial. The plaintiff was nonsuited, and the nonsuit was sustained, upon the ground that it appeared the goods were supplied to the wife whilst her husband was living, so that the price constituted a debt due from him. Lord TENTERDEN, C. J., in alluding to *Lee v. Muggeridge*, said, "The doctrine that a moral obligation is a sufficient consideration for a subsequent promise is one which should be received with some limitation."

In *Meyer v. Haworth*, 8 A. & E. 467 (1838), the defendant pleaded coverture to a declaration in assumpsit for goods sold and delivered. The plaintiff replied that the defendant was at the time of the contract separated from her husband, and living in open adultery; that the plaintiff did not know of the marriage or adultery; and that the defendant, after her husband's death and before action brought, in consideration of the premises, promised to pay. Upon demurrer, Lord DENMAN, C. J., said the subsequent promise was "not sufficient. The debt was never owing from her. If there was a moral obligation, that should have been shown." LITTLEDALE, J., said,—“If there was any moral obligation, it should have been stated. The replication does not support the declaration. The promise in the declaration was altogether void. This is not like the case of an infant whose promise is voidable only.”

Eastwood v. Kenyon, 11 A. & E. 438 (1840), decides that a pecuniary benefit voluntarily conferred by the plaintiff and accepted by the defendant is not such a consideration as will support an action of assumpsit on a subsequent express promise by the defendant to reimburse the plaintiff. Lord DENMAN, C. J., commenting on *Lee v. Muggeridge*, said the remark of Lord TENTERDEN in *Littlefield v. Shee*, "that the doctrine that a moral obligation is a sufficient consideration for a subsequent promise is one which should be

received with some limitation," amounts to a dissent from the authority of that case.

Cockshott v. Bennett, 2 T. R. 763 (1788), decides that a subsequent promise to pay a note void on the ground of fraud, is a promise without consideration, which will not maintain an action: and in *Jennings v. Brown*, 9 M. & W. 501, it was said: "A mere moral consideration is nothing."

Attempts have been made to distinguish the case of *Lee v. Muggeridge* from *Loyd v. Lee* and subsequent cases; but the doctrine of the note in *Wennall v. Adney*, that a mere moral obligation is not sufficient to support an express promise, is generally recognised as correct: *Mills v. Wyman*, 3 Pick. 207; *Loomis v. Newhall*, 15 Id. 159; *White v. Bluett*, 24 E. L. & E. 434; *Cook v. Bradley*, 7 Conn. 57; *Hawley v. Farrar*, 1 Vt. 420; *Ingraham v. Gilbert*, 20 Barb. 152; *Bates v. Watson*, 1 Sneed 376; *Parker v. Carter*, 4 Munf. 273; *McPherson v. Rees*, 2 P. & W. 521; *Frear v. Hardenbergh*, 5 Johns. 272; *Society v. Wheeler*, 2 Gall. 143; Broom Leg. Max. 746; 1 Pars. Cont. 432 n. (t.), 435; Langdell Sum. Law of Cont., sects. 71-79.

In cases of bankruptcy and the Statute of Limitations the law only suspends the remedy. It does not extinguish the debt: *Bank v. Wood*, 59 N. H. 407; *Badger v. Gilmore*, 33 Id. 361; *Wiggin v. Hodgdon*, 63 Id. 39. The contracts of infants are voidable, and may be ratified by an express promise after age. In this respect they are distinguished from the contracts of married women, which, owing to the disability of coverture, are void at common law. Being void, no debt ever existed; and hence they furnish no consideration for a subsequent promise made during widowhood: *Watkins v. Halstead*, 2 Sandf. 311; *Waters v. Bean*, 15 Ga. 358; 1 Pars. Cont. 435. This doctrine has received assent in this state; *French v. Benton*, 44 N. H. 28, 31.

It has been assumed in this discussion that the defendant's testate promised to pay the debt within six years of her death. Whether the evidence was sufficient to warrant such a finding is a question we have no occasion to consider. The defendant is entitled to judgment on the report.

Case discharged.

Supreme Court of Illinois.

MILLET v. THE PEOPLE.

The words "due process of law," in the constitutional provision "that no person shall be deprived of life, liberty or property without due process of law," are synonymous with the words "the law of the land," which mean general public law, binding upon all the members of the community, under all circumstances, and not partial or private laws, affecting the rights of private individuals or classes of individuals.

Sect. 29, art. 4, of the constitution of Illinois, which enjoins legislation in the interest of miners, means legislation for the personal safety of miners, and relates only to the enactment of police regulations to promote that end.

So far as the owner or operator of a mine shall contract for the mining of coal, or the selling of coal by weight, there is no constitutional objection to the statutes imposing upon him the duty of procuring scales for that purpose; but when he has no necessity for the use of scales in these respects, he cannot be compelled to keep and use them.

So much of the act of 1885, amendatory of the act of 1883, providing for the weighing of coal at mines, as provides that all contracts for the mining of coal, in which the weighing of the coal, as provided for in that act, shall be dispensed with, shall be null and void, is in violation of the constitution.

It is not competent for the legislature, under the constitution, to single out owners and operators of coal mines, and provide that they shall bear burdens not imposed on other owners of property or employers of labor, and prohibit them from making contracts which it is competent for other owners of property or employers of labor to make. Such legislation cannot be sustained as an exercise of the police power.

The legislature has not the power to require the owners and operators of coal mines in this state to furnish scales, and employ a person to use them and keep books of entries of weights, for the benefit or information of the public, without first making compensation to the owners, that being tantamount to an appropriation to public use of private property, which is the cost of the scales, and a clerk to keep the books.

APPEAL from the Circuit Court of St. Clair county.

Wilderman & Hamill, for the appellant.

George Hunt, Attorney-General, and *James M. Dill*, for the People.

The opinion of the court was delivered by

SCHOLFIELD, J.—The defendant was indicted and convicted of failing, as the agent of the owner of a certain coal mine, to cause to be furnished and placed upon the railroad track, adjacent to the coal mine, a track scale of standard measure, upon which to weigh the coal hoisted from the mine, as provided by section 1 of "An

act to provide for the weighing of coal at the mines," approved June 14th 1883, and the several sections of the act to amend sections 2, 3 and 4 of that act, approved June 29th 1885.

We held in *Jones v. The People*, 110 Ill. 590, that it was competent to show, in defence of a person indicted under the same section before the approval of the amendatory act of June 29th 1885, that at the time the act took effect, and long prior thereto, the corporation in that case owning and operating the coal mine had a contract with all the men employed to mine coal in that mine, during that period, to receive, as the wages for their labor, from said company, the sum of forty cents per box for each box of coal mined and taken from said mine; that all the persons employed in the mine to mine coal for said company, had always been and were then perfectly satisfied to work under said contract, and that they did not want the coal taken from the mine weighed, as a basis upon which to compute their wages, &c. It was, in considering this question, among other things then said: "Although section 2 does provide that the weight determined by weighing on the scales furnished shall be considered the basis upon which the wages of persons mining coal shall be computed, we do not regard this as requiring that in all contracts for the mining of coal, the wages of the miners must be computed upon the basis of the weight of the coal mined. That would be a quite arbitrary provision—seemingly an undue interference with men's rights of making contracts—and we cannot ascribe to the legislature the making of such an enactment unless it be plainly declared, which is not done in this case."

The second section of the amendatory act, approved June 29th 1885, requires that all coal produced in this state shall be weighed on the scales, as provided in section 1 of the act approved June 14th 1883, and that a correct record of the same shall be kept, in a well bound book furnished by the owner, agent or operator of such mine for that purpose, by a competent person, at the expense of such owner, agent or operator—said record to be subject to the inspection (at all reasonable business hours) of the miner, operator, carrier, landowner, adjacent landowner, members of the Bureau of Labor Statistics, mine inspectors, and all others interested. Section 3 provides that it shall be lawful for the miners employed in any coal mine or colliery in this state, to furnish a check weigher, at their own expense, whose duty it shall be to balance said scales, and see that the coal is properly weighed, and keep a correct

account of the same; and for this purpose he shall have access, at all times, to the beam box of said scales while such weighing is being performed. The fourth section provides, that a fine, or fine and imprisonment, as prescribed, shall be imposed on any owner or agent operating a coal mine, failing to comply with these provisions. And another section provides that all contracts for the mining of coal, in which the weighing of the coal, as provided for in that act, shall be dispensed with, shall be null and void.

The court, at the instance of the People, instructed the jury, that since the first day of July 1885, the law prohibits the making of any contracts between the operators of coal mines and the miners, in which the weighing of coal as provided by law, is sought to be avoided, and the court refused to instruct the jury "that if they believe from the evidence, that the company for which the defendant is working does not sell or offer to sell, coal by weight at its mine at which defendant is employed, and that it has contracts with all the men employed in its mine to mine coal at twenty-five or twenty cents per box, then the jury should find the defendant not guilty."

There was evidence before the jury on which to predicate this instruction. The question is thus presented, whether it is competent for the General Assembly to single out owners and operators of coal mines as a distinct class, and provide that they shall bear burdens not imposed on other owners of property or employers of laborers, and prohibit them from making contracts which it is competent for other owners of property or employers of laborers to make.

It is declared in section 2, article 2, of our constitution, that "no person shall be deprived of life, liberty or property without due process of law." And section 13 of the same article provides that private property shall not be taken or damaged for public use without just compensation. The words "due process of law" in this connection, are held to be synonymous with the words "the law of the land." Cooley on Const. Lim. (1st ed.) pp. 352-3. And this means general public law, binding upon all the members of the community, under all circumstances, and not partial or private laws affecting the rights of private individuals or classes of individuals: *Jones v. Reynolds*, 2 Texas 251; see, also, *Wyenheimer v. The People*, 13 N. Y. 432; *Vanzant v. Waddell*, 2 Yerger 269.

"Every one," says Cooley (Const. Lim., 1st ed., page 391), "has

a right to demand that he be governed by general rules, and a special statute that singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but an arbitrary mandate, unrecognised in free government. Mr. Locke has said of those who made the laws: 'They are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor—for the favorite at court and the countryman at plough.' And this may justly be said to have become a maxim in the law by which may be tested the authority and binding force of legislative enactments." And again, the same authority says (p. 393): "The doubt might also arise whether a regulation made for any one class of citizens, entirely arbitrary in its character, and restricting their rights, privileges or legal capacities in a manner before unknown to the law, could be sustained. Distinctions in these respects should be based upon some reason which renders them important—like the want of capacity in infants and insane persons; but if the legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bonds of legislative power, even if it did not come in conflict with express constitutional provisions. The man or the class forbidden the acquisition or enjoyment of property in the manner permitted to the community at large, would be deprived of *liberty* in particulars of primary importance to his or their pursuit of happiness." See, also, *Budd v. The State*, 3 Humph. 483, where one of the sections of the act incorporating the Union Bank, which provided that if any of the officers, agents or servants of that bank should embezzle the funds of the bank, or make false entries, they should be guilty of felony, was held unconstitutional, because it did not apply generally to officers, agents or servants of banks committing like offences. And *Wally's Heirs v. Kennedy*, 2 Yerg. 554, where an act authorizing the court to dismiss Indian reservation cases where prosecuted for the use of another, was held unconstitutional. In the last case the court said: "The rights of every individual must stand or fall by the same rule or *law* that governs every other member of the body politic, or land, under similar circumstances; and every partial or private law which

directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were it otherwise, odious individuals or corporate bodies would be governed by one law, the mass of the community and those who made the law, by another; whereas a like general law, affecting the whole community equally, could not have been passed." On the like principle is, also, *The People v. Marx*, 99 N. Y. 377.

What is there in the condition or situation of the laborer in the mine, to disqualify him from contracting in regard to the price of his labor, or in regard to the mode of ascertaining the price? And why should the owner of the mine, or the agent in control of the mine, not be allowed to contract in respect to matters as to which all other property owners and agents may contract? Undoubtedly, if these sections fall within the police power, they may be maintained on that ground; but it is quite obvious that they do not. Their requirements have no tendency to insure the personal safety of the miner, or to protect his property, or the property of others. They do not meet Dwarris' definition of police regulations. They do not have reference to the comfort, the safety, or the welfare of society: Potter's Dwarris on Statutes 458. In *Austin v. Murray*, 16 Pick. 221, it was said: "The law will not allow the rights of property to be invaded under the guise of a police regulation, for the promotion of health, when it is manifest that such is not the object and purpose of the regulation." See, also, to like effect, the language of COLT, J., in *Watertown v. Mayo*, 109 Mass. 315, and the opinion of the court and cases referred to in *Matter of Application of Jacobs*, 98 N. Y. 109, *et seq.*, and *The People v. Marx*, *supra*.

But it is suggested in argument, that one purpose of the sections is to furnish needful information to the public. If that be so, then, under section 13, article 2, *supra*, there must first be made compensation to the owner of the property thus to be devoted to public use; for it must be too apparent to need argument in its support, that to compel the purchasing of scales, and the employing of a person to use them, for the benefit of the public, is to appropriate the private property,—i. e., the money which this will cost,—to public use: *Morse v. Stoeker*, 1 Allen 150; *State v. Glenn*, 7 Jones' L. 321.

The main reliance of the counsel representing the state, to sus-

tain the ruling below, seems, however, to be on the ground that mining for coal is affected with a public use, so that it may be regulated by law, like public warehouses, as held in *Munn v. Illinois* 94 U. S. (4 Otto) 113. It cannot be claimed that mining for coal was, by the common law, affected with a public use, and therefore specially regulated by law, like the business of inn-keepers, common carriers, millers, &c.; and, in our opinion, it is not like the business of public warehousing, within the principle controlling such classes of business. The public are not compelled to resort to mine owners any more than they are compelled to resort to the owners of wood, or turf, or even to the owners of grain, domestic animals, or to those owning any of the other ordinary necessities or conveniences of life, which form a part of the commerce of the country. The owner of a coal mine is under no obligation to obtain a license from any public authority, and, therefore, when he chooses to mine his coal, he exercises no franchise. We are aware of no case wherein it has been held that the owner or operator of a coal mine stands on a different footing, as respects the control and sale of his property, than the owner or operator of any other kind of property in general demand by the public.

We are not unmindful that our constitution, in sect. 29, art. 4, enjoins legislation in the interest of miners; but this is solely as respects their personal safety—the enactment of police regulations to promote that end. It recognises that the business is dangerous to life and health, but it nowhere intimates that there is anything in it which disqualifies parties engaged in it from contracting as they may in regard to other matters, or that gives the public a use in it. There is, also, in sect. 5, art. 13, a provision requiring railroad companies to permit connections to be made with their tracks, so that coal banks or coal yards may be reached: but the same provision also applies to consignees of grain, and it affects the duty of the carrier alone, for no duty or obligation is enjoined on the owner of the coal bank or coal yard in that respect. We recognise fully the right of the General Assembly, subject to the paramount authority of Congress, to prescribe weights and measures, and to enforce their use in proper cases; but we do not think that the General Assembly has power to deny to persons in one kind of business the privilege to contract for labor and to sell their products without regard to weight, while at the same time allowing to persons in all other kinds of business this privilege, there being

nothing in the business itself to distinguish it in this respect from any other kind of business; and we deny that the burden can be imposed on any corporation or individual not acting under a license or by virtue of a franchise, of buying property and hiring labor merely to furnish public statistics, unless upon due compensation to be made therefor.

So far as the owner or operator of a mine shall contract for the mining of coal or the selling of coal by weight, we see no objection to the statute as imposing upon him the duty of procuring scales for that purpose. But we do not think that he can be compelled to make all his contracts in these respects to be regulated by weight, and when he has no necessity for the use of scales in these respects, he cannot, in our opinion, be compelled to keep and use them. We think the court erred in its ruling in giving the one and refusing the other instruction.

The judgment is reversed, and the cause remanded for further proceedings consistent with this opinion.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF ILLINOIS.¹

SUPREME JUDICIAL COURT OF MAINE.²

SUPREME JUDICIAL COURT OF MASSACHUSETTS.³

COURT OF ERRORS AND APPEALS OF MARYLAND.⁴

SUPREME COURT OF NEW HAMPSHIRE.⁵

ACTION. See *Insurance*; *Slander*.

AGENT. See *Insurance*.

ASSIGNMENT.

Partial Assignment of Debt may be enforced in Equity—Assignment not in Fraud of Insolvent Law.—A. had made a contract to erect a school-house for the city of N., but became insolvent, and, in order to secure funds to enable him to complete his contract, made an assignment to C. of \$600, which was a part of the sum to be due to him from the city of N. upon the completion of the school-house, and C. thereupon advanced him certain sums of money. *Held*, that the assignment was

¹ From Hon. N. L. Freeman, Reporter; to appear in 117 Ill. Rep.

² From Joseph W. Spaulding, Esq.; to appear in 78 Me. Rep.

³ The cases will probably appear in 142 or 143 Mass. Rep

⁴ From J. Shaaf Stockett, Esq., Reporter; to appear in 65 Md. Reports.

⁵ The cases will probably appear in 64 or 65 N. H. Rep.

not in fraud of the insolvent law, and could be enforced in equity: *James v. City of Newton*, 142 or 143 Mass.

BILLS AND NOTES.

Promissory Note—Estoppel.—A promissory note reciting "we" promise to pay, and signed "D. P. Livermore, Treas'r, Hallowell Gas-Light Co.," is the note of the individual and not of the corporation: *McClure v. Livermore*, 78 Me.

An action on such a note against the corporation, and its default, will not estop the owner from maintaining an action against the individual, when it does not appear that the acts of the plaintiff caused the defendant to change his position, or to take some action injurious to himself: *Id.*

CRIMINAL LAW.

Homicide—Admissibility of Evidence—Res Gestæ.—On a trial for murder, evidence of what occurred at a saloon, a half a square from the saloon where the homicide occurred, and only four or five minutes before the killing, is admissible to show the movements and general conduct of the prisoner, immediately preceding the killing, and that he was armed and prepared for mischief, and in a frame of mind likely to result in mischief: *Kernan v. State*, 65 Md.

What was said and done by others at the same time and in company with the prisoner, was only a part of what he was directly connected with, and was inseparably connected with the history of his conduct at the time, and necessary to an intelligent appreciation of his actions: *Id.*

CONFLICT OF LAWS.

Insolvency—Jurisdiction—Discharge in another State.—A defendant's discharge under the insolvency law of Massachusetts is no bar to a suit in New Hampshire, on a contract made in that state before the insolvency, when the plaintiff has not resided there since the insolvency proceedings were begun, and has not submitted to the jurisdiction of the insolvency court: *Norris v. Atkinson*, 64 or 65 N. H.

CONTRACT. See *Insurance*.

CORPORATION. See *Master and Servant*.

Municipal Corporation—Rules of Procedure—Quorum.—In authorizing the City Council of Baltimore to "settle their rules of procedure," the Legislature did not confer on the Council the power to declare by rule what number of their body should constitute a quorum for the transaction of business: *Heiskell v. The Mayor and City Council of Baltimore*, 65 Md.

In a municipal corporation consisting of a definite number, in the absence of any Legislative declaration of what number shall constitute a quorum or legal body, a majority of the members elected shall constitute such quorum or legal body: *Id.*

A mere majority of the members elected being present, the acts of the City Council of Baltimore are valid, notwithstanding the existence of a rule adopted by the Council, requiring that two-thirds of the members elected shall be necessary to constitute a quorum: *Id.*

A municipal corporation cannot, by a rule made by itself, either enlarge or diminish its own powers : *Id.*

DAMAGES. See *Eminent Domain* ; *Slander* ; *Trespass* ; *Waters*.

EMINENT DOMAIN.

Damages, Measure of—Destruction of Pond Supplying Water to a Steam Mill—Evidence to show other Sources of Supply.—In a proceeding to condemn a strip of land for a railroad track, which crossed a pond supplying the land-owner's steam-mill with water, on the question of damages to the mill property not taken, the defendant gave estimates on the basis that the pond would be destroyed as a source of supply of water for the mill, and there would be no other means of supply. The petitioner then offered to show that a certain water-works company would furnish the mill regularly with all the water it might require, at a less cost than that of pumping from the pond, and also that a creek flowing nearer the mill than the pond had a capacity to furnish better water and an abundance, for the use of the mill, which the court refused to admit. *Held*, that the court erred in excluding the evidence : *Railroad and Coal Co. v. Switzer*, 117 Ill.

EQUITY. See *Assignment* ; *Mortgage*.

ESTOPPEL. See *Bills and Notes*.

EVIDENCE. See *Criminal Law* ; *Eminent Domain* ; *Insurance* ; *Negligence* ; *Stocks*.

EXECUTORS AND ADMINISTRATORS. See *Insurance*.

INSOLVENT LAW. See *Assignment* ; *Conflict of Laws*.

INSURANCE.

Contract—Evidence—Executors and Administrators—Action.—C. obtained a certificate of life insurance from the United Order of the Golden Cross, which provided that the sum insured should be paid to H. at C.'s death. That was done : *Held*, in an action by C.'s executor against H., that evidence was admissible to prove the defendant promised C., that, after deducting whatever sum might be due him from C., at C.'s death, from the insurance money, he would pay the balance over to C.'s heirs. *Held*, further, that C.'s executor was the proper party to bring suit on such a promise : *Catland's Exec'r v. Hoyt*, 78 Me.

Marine Policy—Spontaneous Combustion.—In an ordinary marine policy, the insurance against fire does not cover the case of spontaneous combustion, caused by the inherent infirmity of the goods insured : *Ins. Co. v. Adler*, 65 Md.

Insurance Company.—Stock and Mutual Departments—Rights of Stockholders.—The surplus of earnings accumulated from the operations of the stock department of an insurance company, run upon the stock and mutual principles, the business of the two departments being entirely distinct and conducted separately, the taxes of the guaranty-stock department being paid by the company, and charged to the stock department, and none of the earnings of the stock department being

paid to the holders of mutual policies, upon the winding up of the affairs of the stock department, belongs to the stock department, and should be distributed among the share holders of the fund of that department according to their several shares: *Ins. Co. v. Brown*, 142 or 143 Mass.

Fire Insurance—Cancellation of Policy—Liability of Agent for Negligence—Usage—Action.—The question of whether an agent of a fire insurance company has used reasonable diligence in cancelling a policy after being instructed so to do by the company, is a mixed question of law and fact; and where it appears that the agent could have notified the insured of the refusal of the company to take the risk within half an hour, but did not do so for several days, it will not be held that the court before whom the case was tried, without a jury, erred in finding that the agent did not exercise that diligence which it was his duty to use, and in refusing to rule that the company could not recover of the agent the amount paid by them under the policy; and an offer by the agent to show that it is customary for agents of insurance companies to notify the insured, in such cases, at their own convenience, and that they are given from five to ten days to cancel a policy, is inadmissible: *Phœnix Ins. Co. v. Frissell*, 142 or 143 Mass.

An insurance company having paid a policy after proof of loss, in consequence of a liability caused by the negligence of an agent in not using reasonable diligence in cancelling a policy, after having been instructed to do so, may bring an action against the agent for the amount so paid, immediately after such payment, although the sixty days which it reserves as a time within which to pay the loss has not expired: *Id.*

LEX LOCI CONTRACTUS. See *Stocks*.

MASTER AND SERVANT.

Injuries on Machine—Corporation not Obligated to Fence Machine—Contributory Negligence—Peculiarly Dangerous Machine—Risks of Employment—Charge.—A manufacturing corporation is not bound to fence a machine used in their business, where the machine is not of a peculiarly dangerous character; and is not liable for personal injuries caused by the machine to an employee who was obliged to pass the machine in going to his work, and to whom suitable instructions had been given, having reference to his age and capacity, so as to enable him to understand the dangers of the employment in which he was engaged. Neither is the corporation liable for injuries because the machine might have been placed in a different or less dangerous position. Evidence that a gate might have been placed in front of the machine is immaterial: *Rock v. Indian Orchard Mills*, 142 or 143 Mass.

Exceptions to the judge's charge will not be sustained unless it is made to appear that there is some substantial error in the charge which misled the jury; and, where there was evidence that the plaintiff was playing about the machine on which he was injured, a statement in the charge, that if the jury found that to be the fact, the plaintiff was guilty of contributory negligence, which would prevent him from recovering, is not open to objection: *Id.*

It is not charging upon the facts for a judge to state in his charge that a machine on which the plaintiff was injured, was not a peculiarly dangerous one, the fact being self-apparent: *Id.*

An employee of a manufacturing corporation, who has been properly instructed as to the use of a machine upon which he is set to work, is supposed to undertake the risk of his employment, and cannot recover for injuries resulting from use of the machine, and the company is not obliged to fence the machine, or place it in a less dangerous part of the room : *Id.*

Dangerous Employment—Duty of Master to give Notice.—It is the duty of a master who sets a servant to work in a place of danger to give him such notice and instruction as is reasonably required by the youth or inexperience or want of capacity of the servant ; and this duty is not confined to cases where the servant is a man of manifest imbecility : *Atkins v. Merrick Thread Co.*, 142 or 143 Mass.

MORTGAGE.

Surety—Equity.—Where a surety on a mortgage debt pays the same to the holder and receives the note and mortgage, without any assignment or discharge written thereon, he cannot maintain a bill in equity against the owners of the equity of redemption, praying that the mortgage "may be decreed to be still subsisting, that he may be subrogated to the rights of the mortgagee therein, and may be empowered to foreclose the same according to law : " *Lynn v. Richardson*, 78 Me.

NEGLIGENCE. See Master and Servant.

Death of Employee—Evidence—Defect in Machinery.—In an action to recover damages for personal injuries to the plaintiff's intestate, where the evidence showed that the deceased was burned by a quantity of starch which escaped from a boiler, the action cannot be maintained where the evidence does not disclose that the boilers were improperly constructed or out of repair, and that the accident did not occur by reason of the carelessness of the deceased. *Blanchette, Adm'r v. Border City Manufacturing Co.*, 142 or 143 Mass.

Evidence—Railroads—Unsuitable Stopping Places.—In an action for personal injuries sustained on leaving the rear car of a train at a station, evidence that others had previously been directed to take that car, and in alighting from it as the plaintiff did, had been injured, is competent to show negligence in the defendants in not providing a suitable stopping place, and to show want of negligence in the plaintiff : *Bullard v. Boston & M. Rd.*, 64 or 65 N. H.

NOTICE. See Master and Servant.

PRINCIPAL AND AGENT.

Commission Merchant—Consignor—Separate Accounts—Usage.—Where the plaintiff, a commission merchant, receives consignments from the defendant, a manufacturer, who is the owner of three different mills, run under three different names, one being carried on in the name of defendant, the plaintiff being ignorant that the three mills are owned by the defendant, and the accounts of the three concerns being kept separate, in an action brought by the plaintiff to recover the balance of an account with the mill run under the name of the defendant, where the answer is a general denial and payment, the defendant will not be

allowed to show that a balance is due him upon the account between plaintiff and another of the mills, which should be credited him in this suit, and such balance can only be availed by way of set-off; and defendant cannot show that there were in the plaintiff's hands, goods from the mill run in defendant's name, which were not included in the account sued on: *Talcott v. Smith*, 142 or 143 Mass.

In an action against the defendant, a manufacturer, by a commission merchant, to recover a balance due for advances on manufactured goods, the latter will be allowed to charge in his account for printing the goods, it appearing that this was done under the usage of commission merchants, and was a necessary charge: *Id.*

QUORUM. See *Corporation*.

REDEMPTION. See *Tenants in Common*.

RES GESTÆ. See *Criminal Law*.

SET-OFF.

Defendant holding Affirmative—Time when Right of Action on Cross-Demand must Accrue.—In pleading a set-off, the defendant assumes the position of a plaintiff, and, in order to recover, is required to prove the same facts which he would be required to prove if he had brought his action on his demand: *Ellis v. Cothran*, 117 Ill.

A defendant cannot recover on a matter by way of set-off, when his claim or demand was not due at the time plaintiff brought his action: nor can he, after suit brought, purchase a demand against the plaintiff and set it up as a defence: *Id.*

SLANDER.

Actionable Words—Special Damage.—Words falsely and maliciously spoken, which impute to a clerk the want of any qualifications which, as such, he ought to possess, or any misconduct which would unfit him to discharge faithfully and correctly all the duties pertaining to his position, are actionable, if in consequence thereof he is dismissed from his employment: *Wilson v. Cottman*, 65 Md.

When some specific damage is caused by words falsely and maliciously spoken, they may become actionable, when otherwise the law would give no redress against the person speaking them: *Id.*

The defendant falsely and maliciously spoke of the plaintiff the following words, by reason of which he lost his position as clerk and assistant weigh-master: "He has caused the downfall and ruin of my clerk." "Will (meaning the plaintiff), has been the ruination of my clerk; I do not want him (meaning the plaintiff), to have anything to do with my business;" meaning that plaintiff should not weigh any goods consigned to the defendant. *Held*, that the words thus spoken were actionable: *Id.*

SPONTANEOUS COMBUSTION. See *Insurance*.

STOCKHOLDERS. See *Insurance*.

STOCKS.

Stock Gambling—Sales on Margins—Lex Loci Contractus—Evidence.—The plaintiffs sued the defendant in assumpsit to recover an alleged

balance due them for services, advances, and interest on purchases and sales of stocks, bonds and grain, alleged to have been made by them for defendant at his request. Both plaintiffs and defendant resided in York, Pennsylvania, where the former conducted the business of bankers and brokers. The plaintiffs bought and sold on orders of the defendant, who deposited from time to time, a margin, or left certain profits as they accrued, with the plaintiffs to cover and protect them in the fluctuations of prices. The plaintiffs made their negotiations in the markets of New York, Baltimore, Chicago and Philadelphia. The defendant failing to keep up his margins, the plaintiffs sold some stocks credited to him, and sued for the balance still required for their reimbursement. The defendant pleaded specially that by the law of Pennsylvania, where the contracts were made and to be performed, they were all gambling transactions and void, as the real intent of the parties was to wager on, and speculate in the rise or fall of the prices of the articles dealt in, which were not to be actually delivered, but the one party was to pay and the other party to accept the differences between the contract prices and the market prices of the same at the dates fixed for executing said contracts, or when said contracts should be closed. *Held*, 1st. That it was competent for the defendant to show, that although in form the transaction was perfectly legal, it was in fact a mere guise under which a gambling transaction might be conducted. 2d. That although the plaintiffs may have acted merely as defendant's broker in negotiating the contracts, and were suing not on the contracts, themselves, but for services performed and money advanced for the defendant, they stood in the same position as if seeking to enforce the original agreement, and could not recover for services rendered or losses incurred by themselves in forwarding the transaction. 3d. That as to the *locus* of the transaction, the jury should have been given the law of Pennsylvania, as comprised in the decisions of that state, bearing on wagering contracts within its limits. 4th. That the action being for services rendered by the plaintiffs to the defendant, it was their relations with him on which the suit was based; and the parties with whom they dealt in making the purchases and sales were in nowise connected with the suit. 5th. That the validity of the transaction was to be tested by the Pennsylvania cases, according to which, if there was such an understanding between the plaintiffs and the defendant, as the latter claimed there was, the transactions were merely wagers, and no recovery could be had by the plaintiffs: *Stewart v. Schall*, 65 Md.

STREETS.

Rights of Abutting Lot Owners to Mine under.—A party owning city lots has not the right to make a subterranean passage from one to another through the underlying soil of a public street, the fee of which is not in him, in order to mine and remove minerals, etc., even though no injury may result thereby to the street as such: *Zinc Co. v. City of La Salle*, 117 Ill.

SURETY. See *Mortgage*.

TENANTS IN COMMON.

Improvements upon the Common Property.—One tenant in common may rightfully insist that the other shall contribute his proportionate

share for the preservation of the joint property, but he cannot insist that he shall enter upon new investments, to be paid for from the joint property, or out of other funds belonging to him, against his judgment and inclination: *Field v. Leiter*, 117 Ill.

Redemption from Tax Sale.—Where one tenant in common of land exercises the right given him by law to redeem the entire premises from a sale for taxes, such redemption will inure to the benefit, also, of his co-tenant, upon the condition that he, or those claiming under him, will pay the one redeeming one-half of the cost of the redemption: *Lomax v. Gindele*, 117 Ill.

Where one of two tenants in common of a tract of land which had been sold for taxes, instead of redeeming directly from the sale, made an agreement with the holder of the certificate of purchase that the latter should take out a tax deed thereon and then convey the premises to the former, which was done, it was held, that the transaction amounted to but a redemption for the benefit of both tenants in common, and that a court of equity would compel the one taking a conveyance of the tax title, to convey to the other one individual half of the tax title, upon payment of half the cost thereof: *Id.*

Partition—Decree, Conclusiveness of.—A decree of partition not appealed from in a court of probate, is conclusive upon the parties and their privies as to the title at the time of its rendition; and they are estopped to claim a greater interest in the land than the share decreed to them: *Davis v. Durgin*, 64 or 65 N. H.

TRESPASS.

Quære Clausum Fregit.—*Damages.*—In trespass *quære clausum* for felling the defendant's trees across the line of fence, and covering the plaintiff's land with brush, the measure of damages is not confined to the expense of removing the brush, nor is it limited to the value of the land encumbered: *Hutchinson v. Parker*, 64 or 65 N. H.

TROVER AND CONVERSION.

Evidence of Conversion—Defendant's Breach of Contract.—To constitute a conversion of chattels there must be some exercise of dominion over the property, in repudiation of or inconsistent with the owner's rights: *Evans v. Mason*, 64 or 65 N. H.

In an action of trover for a horse hired by the defendant to go to and from a place named, without stopping, his mere delay in returning is not sufficient evidence of a conversion: *Id.*

TURNPIKE.

Toll.—The Baltimore and Fredericktown Turnpike Road, under its charter (Act of 1804, ch. 51), is entitled to charge and collect toll for ten miles, from a person passing through the ninth gate on its road westward from Baltimore city—toll for the three miles east and the seven miles west of the gate—whether he actually starts from Frederick and stops at Middletown, which is only five miles west of the gate, or not; and a person going east must pay for the same ten miles, and not simply for the six miles between gates numbers nine and eight: *Turnpike Road v. Rautzahn*, 65 Md.

USAGE. See *Insurance ; Principal and Agent.*

WATERS.

Floatable Streams—Log Driving—Reasonable use—Damages.

Where one deliberately and without compulsion, selects a particular portion of a floatable stream, for the storage of logs, and thereby prevents another from entering such common highway with a drive of logs from a tributary stream, he is liable to such other person for the damages occasioned thereby : *McPheters v. Log Driving Co.*, 78 Me.

Wages and board of men while waiting for a reasonable time would be an element of damages ; so, too, would the expense of moving one crew out and another in, as well as the increased cost, if any, of making the drive next season, and the interest on the contract price for making the drive during such time as the payment thereof was delayed, because of inability to complete the drive on account of such obstruction : *Id.*

The loss of supplies left in the woods, for use when completing the drive, and destroyed by wild beasts, would not constitute an element of damage, being too remote : *Id.*

Aqueduct—Easement—Prescription—Extinguishment of Easements.

—An easement originating from water supplied by a spring not situated upon land belonging to the grantor of the plaintiff's premises, will not pass as an appurtenance to the estate conveyed, unless it has become attached to the same. *Douty v. Dunning*, 78 Me.

But where such easement, although not originally belonging to an estate, has become appurtenant to it, either by express or implied grant, or by prescription, a conveyance of that estate will carry with it such easement, whether mentioned in the deed or not, although it may not be necessary to the employment of the estate by the grantee : *Id.*

There may be such an adverse and exclusive use of water flowing through an aqueduct, and for such a period of time, as may well be considered presumptive evidence of a grant : *Id.*

Such right may be thereby acquired by prescription : *Id.*

The right to draw water from a spring and to have pipes laid in the soil of another, and for that purpose to enter thereon, repair and renew the same, constitutes an interest in the realty, assignable, descendible and divisible : *Id.*

Easements growing out of it may be acquired by grant or prescription, and thus become the objects of title in others : *Id.*

An easement will become extinguished by unity of title and possession of the dominant and servient estates in the same person by the same right : *Id.*

But in order that the unity of title shall operate to extinguish an existing easement, the ownership of the two estates must be co-extensive, equal in validity, quality, and all other circumstances of right. If one is held in severalty and the other only as to a fractional part thereof by the same person, there will be no extinguishment of the easement : *Id.*

WILL.

Right of Disposition of Property—Disposing Capacity.—A party having the capacity to make a will, may dispose of his property as he

sees fit, and if he makes an unequal disposition among his heirs, it is wholly immaterial whether he has any reasons therefor or not. In a case where the evidence as to a person's capacity to make a will was conflicting, the court instructed the jury, that if they should believe, from the evidence, that at the time of the execution of the instrument (the validity of which was in question), by the testator, he was so diseased mentally, as not to be of sound mind, then their verdict should be for the complainants, the contestants: *Held*, that the instruction was erroneous, as it stated the rule too broadly: *Fremm v. Easley*, 117 Ill.

A person may be so diseased, mentally, as not to be of sound mind, and yet possess a disposing mind, which is the mental capacity to know and understand what disposition he may wish to make of his property, and upon whom he will bestow his bounty: *Id.*

A person who is capable of transacting ordinary business is also capable of making a valid will. The derangement or imbecility, to incapacitate a person from making a will, must be of that character which renders him incapable of understanding the effects and consequences of his acts. If a party is capable of acting rationally in the ordinary affairs of life, so that he may comprehend what disposition he may wish to make of his property, and be able to select the objects of his bounty, that is all that is required to make a will: *Id.*

Bequest—Vested Interest—Life Interest—Remainder.—A bequest of a sum of money to one after the decease of the legatee, to whom the income of the money is given during life, vests at once on the testator's death: *Crosby v. Crosby*, 64 or 65 N. H.

Election to Take under Will.—Where a testator devises property to his sons, and also property belonging to them to another, they must either relinquish their claim to their own property so devised, or to the provision made in their favor. A party cannot take under a will and contrary to it. In such case he must make his election: *Ditch v. Sennot*, 117 Ill.

The doctrine of election does not apply where the testator has but a part interest in an estate which he devises; but even in such a case, if it is apparent from the terms of the will that the testator intended to devise the whole estate, including the interest of a third person, then the doctrine will apply as to such third person, if a devisee: *Id.*

WITNESS.

Competency of Grand Juror to Testify to Evidence given before Grand Jury.—On the trial of a party for larceny, after laying the proper foundation, a grand juror was called to contradict one of the defendant's witnesses, by testifying to his statements on oath before the grand jury, which he had denied. It was objected that a grand juror could not be called as a witness to disclose what occurred before the grand jury, but the court held the evidence proper; *Bressler v. The State*, 117 Ill.

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ACCORD. See WILL, 5.

Note of debtor endorsed by third person for less sum than debt received by creditor in settlement of same, is a good accord and satisfaction. *Varney v. Conery*, 138.

ACTION. See ATTACHMENT, 6-8. CHAMPERTY. CONFLICT OF LAWS, 6, 7. CONTRACT, 15, 22. DEED, 1. DOWER. EQUITY, 14-16. EXECUTORS AND ADMINISTRATORS, 3, 4. FRAUD, 2. HUSBAND AND WIFE, 17-18. INSURANCE, 5, 6, 25, 30. LIMITATIONS, STATUTE OF, 6. MORTGAGE, 1. NEGLIGENCE, 6. SHIPPING, 3, 4. VENDOR AND VENDEE, 2.

1. Both at law and in equity a living person has no heirs, even if *non compos mentis* or otherwise incapable of managing his estate. *Sellman v. Sellman*, 69.

2. Children of grantor cannot maintain bill against grantor and his grantee, to set aside conveyance upon ground of fraud and undue influence. *Id.*

3. If party continues to occupy premises after being notified by owner that if he does so, he will be expected to pay rent, he becomes liable to owner for use and occupation. *Illinois Cent. Rd. v. Thompson*, 670.

4. Where one has paid to another money on a contract and subsequently there is rescission of same entitling former to recover part of money so paid, he may do so on count for money had and received. *Evans v. Givens*, 670.

5. Rule that person injured by a felony is not allowed to sue for damages until he has instituted criminal proceedings, only applies between parties injured and injuring. *Appleby v. Franklin*, 304, and note.

6. Under building contract containing clause that the work shall be done under direction and to satisfaction of particular person, to be testified by his certificate, no action accrues to contractor until he has certificate or is entitled to it. *Kirtland v. Moore*, 206.

7. An action of assumpsit cannot be sustained for use and occupation of real estate, unless relation of landlord and tenant exists under a contract express or implied; and a contract will not be implied when neither party expected payment of rent. *Clark v. Clark's Adm'r.*, 768, and note.

8. An executor, during settlement of an estate, allowed father of devisees to occupy lands bequeathed them, neither party expecting payment, they living with their father, but never having had possession or the right of possession: *Held*, that assumpsit would not lie against their father's estate for the use, and that nothing could be recovered, although the case was tried under a reference. *Id.*

9. Relation of parent and child tends rather to rebut than to raise implication of contract for rent. *Id.*

ACTS OF CONGRESS.

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1874, Revised Statutes.

Sects. 512-515.

Sect. 2322.

Sect. 2504, sched. M.

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See ERRORS AND APPEALS, 10.

ADMINISTRATOR. See **EXECUTORS AND ADMINISTRATORS.**

ADVANCEMENT.

Acceptance by son of conveyance of land from father, in satisfaction of his share in father's estate, not only bars his own right to share in distribution of father's estate, real and personal, but also that of his children, in case he should die before his father. *Simpson v. Simpson*, 404.

AGENT. See **BAILMENT**, 1, 3. **BANK**, 8, 9, 12, 20, 22. **BILLS AND NOTES**, 3, 8. **CORPORATION**, 2. **CRIMINAL LAW**, 9. **INSURANCE**, 12, 27, 31-33. **LIMITATIONS, STATUTE OF**, 8. **MASTER AND SERVANT**, 10. **SALE**, 4. **SET-OFF**, 3. **USURY**, 1.

1. Agent who has authority to contract for sale of chattels, has authority to collect pay for them at the time or as part of same transaction, in absence of any prohibition known to purchaser. *Trainer v. Morison*, 538. See *infra* 9.

2. Knowledge of such prohibition may be inferred from circumstances of sale or from customs of trade known to parties. *Id.*

3. Persons dealing with agent have right to presume his agency general, and notice of limited authority must be brought to their knowledge before they are bound to regard it. *Id.*

4. Notice of limited authority of agent, in this case, printed at top bill accompanying goods and not seen by purchasers, is not so prominent as to hold them at fault in not observing it. *Id.*

5. In the absence of a showing to the contrary, it is presumed that agent with general authority to sell, has authority to warrant, and that warranty is not an unusual incident to a sale by an agent for a dealer where the thing sold is not subject to the inspection of the purchaser. *Talmage v. Bierhouse*, 276.

6. Though the authority of the agent be restricted by instructions from his principal, the latter will be bound by a warranty attending a sale by the agent unless the purchaser knew of such restriction. *Id.*

7. In action by commission-merchant against manufacturer, to recover balance due for advances on manufactured goods, former will be allowed to charge for printing the goods, it appearing that this was necessary and done according to custom of trade. *Talcott v. Smith*, 795.

8. Rule that authority of agent to sell goods imports authority to receive proceeds of sale, is limited to cases where circumstances induce belief in purchaser that such authority exists. *Meyer v. Stone*, 539.

9. Agent to sell goods who has possession of them, and delivers them to purchaser, has authority to collect purchase price; but if merely employed to sell and without possession of goods, he has no authority to receive price, and payment to him will not discharge purchaser, unless there is known usage of trade to justify him in making it. *Id.*

10. A deaf mute who does not understand any matter of business, and can not be made to understand it, except it may be such as is of the most simple character, and who has no comprehension of business matters, obviously can not manage his own affairs and is incapable of selecting an agent to transact them. *In re Perrine, &c.*, 776, and note.

11. Contract to sell land purporting to belong to *feme covert*, was made by one who acted as her agent: *held*, that contract was not binding on *feme*, 1st, because of her coverture, and 2d, because agent's authority was not under seal. Such contract is not binding on agent, because its terms do not purport to bind him. *Boyd v. Turpin*, 341.

12. Son conveyed land to mother, a *feme covert*, to defraud his creditors, and afterwards contracted in her name and as her agent, to sell the land to *bona fide* purchaser. After portion of purchase-money had been paid, mother attempted to repudiate contract and recover possession: *Held*, by court of equity, that she must either surrender land to son or abide by his disposition of it. *Id.*

AMENDMENT. See **JUDGMENT**, 2.

1. Court cannot, except by consent, allow amendment which changes pleadings so as to make substantially a new action, but an amendment which only adds to original cause of action is not of this nature. *Ely v. Early*, 342.

2. In an action to recover land, court may allow amendment so as to set up mistake in a deed. *Id.*

AMENDMENT.

3. Where distinct cause of action is inserted in complaint by amendment, it is tantamount to bringing a new action, and statute of limitations runs to time when amendment is allowed. *Ely v. Early*, 342.

4. Court will only correct mistake in deed or other written instrument, upon clear, strong and convincing proof; mere preponderance of evidence is insufficient. *Id.*

5. In trial by jury of issues arising in equitable matters, rules of equity should be followed as far as possible. *Id.*

6. Issues of fact, as distinguished from questions of fact, in equitable as well as in legal actions, must be tried by jury; but this does not authorize finding of such issues on less evidence than chancellor would find them. *Id.*

ANNUITY. See **WILL**, 11.**ARBITRATION.**

1. Court of equity will enjoin suit at law on award, and set same aside where one of the parties in interest made statement to arbitrator, in absence of adverse party, designed and having tendency to influence his decision, without its being shown that any harm resulted therefrom to other party. *Catlett v. Dougherty*, 405.

2. Party to an arbitration, who, by overt acts, attempts to improperly influence an arbitrator in his favor, will not be heard to say that he was impotent to accomplish what he sought and raise an issue thereon. *Id.*

ASSIGNMENT. See **BANKRUPTCY**, 2, 3; **CONTRACT**, 18; **COVENANT**, 1; **DEED**, 7, 8; **EQUITY**, 23; **GIFT**, 4; **MORTGAGE**, 29; **PARTNERSHIP**, 2; **REMOVAL OF CAUSES**, 1.

1. Reservation of reasonable fee for preparation of deed is a preference forbidden by insolvent act of Maryland. *Wolfsheimer v. Rivinus*, 343.

2. Order drawn by creditor on debtor, directing payment out of specified sum, presented but not accepted, is a good assignment in equity. *Kirtland v. Moore*, 206.

3. To make an oral assignment of a debt due on account valid, there must be a valuable consideration, and at least a symbolical delivery. *White v. Kilgore*, 138.

4. An order, draft, or bill, drawn for valuable consideration for the whole of a particular fund, is an equitable assignment of such fund to payee. *Lee v. Robinson*, 670.

5. Such assignment is valid against creditor subsequently garnishing, even if garnishee was not notified of assignment until after garnishment, provided he has time to disclose it by affidavit before judgment. *Id.*

6. A. had made contract to erect school house for city, and, becoming insolvent, in order to secure funds with which to complete his contract, assigned to C. \$600 of the sum to be due him when school house should be finished. Held, that assignment was not in fraud of insolvent law and could be enforced in equity. *James v. City*, 791.

7. In absence of forbidding statute, sole surviving partner of insolvent firm, who is himself insolvent, can make valid assignment of partnership assets for benefit of joint creditors, with preferences, his fraudulently omitting from schedule certain property and appropriating same to his own use, does not affect rights of assignee and of beneficiaries, they being ignorant of grantor's fraud. *Emerson v. Senter*, 472.

ASSUMPSIT. See **ACTION**, 7, 8.**ATTACHMENT.** See **ASSIGNMENT**, 5. **BANK**, 14, 16, 18. **BILLS AND NOTES**, 15. **EXEMPTION**, 6, 7, 9. **HUSBAND AND WIFE**, 16. **INSURANCE**, 22. **PARTNERSHIP**, 1, 2. **SALE**, 9.

1. Claim for tort is not a "debt" within foreign attachment statute, even if suit has been brought and case stands for hearing in damages after a default. *Holcomb v. Winchester*, 70.

2. Stock in private corporation may be attached by service upon the corporation, which may itself be the attaching creditor. *Norton v. Norton*, 70.

3. Where, prior to service of such process, shareholder has pledged the cer-

ATTACHMENT.

tificates with absolute power of sale and transfer upon default endorsed, attachment only reaches surplus, and court may, proper parties being before it, order sale of stock. *Norton v. Norton*, 70.

4. Such attachment has precedence over later one served upon pledgee, who has never exercised power of sale and transfer. *Id.*

5. Dividends made by corporation and remaining in its hands after attachment has been served, follow the stock. *Id.*

6. Where it is attempted to join in one attachment proceedings for debts due and for others not due, and allegations in affidavit as to debts not due are insufficient, they will not vitiate allegations or proceedings as to debts which are due, but will be treated as surplusage. *Eng. Co. v. Hall*, 670.

7. That attachment proceedings for debts due and those not due can be joined in same suit doubted, but not decided. *Id.*

8. Purpose of statutory provisions as to attachment for debt not due, in requiring affidavit that it is actually an existing debt or demand, is to exclude from such remedy contracts on which liability of defendant is still contingent. *Id.*

9. Is "improperly" sued out within meaning of statute when plaintiff has no meritorious cause of action of class in which statute authorizes this remedy, or having such cause, ground alleged in affidavit for its issue is untrue & not one of grounds enumerated which must exist before it can be obtained. *Steen v. Ross*, 735.

10. Mere irregularity in papers is not of itself ground for recovery on attachment bond for "improperly" suing out attachment. *Id.*

11. In action on bond for "improperly" suing out the attachment, declaration must state in what the impropriety consisted. *Id.*

12. General attachment of all a debtor's interest in real estate, in a town, does not hold land fraudulently conveyed by debtor by deed recorded before attachment and conveyed by his fraudulent grantee to innocent purchaser for value after attachment. *Bank v. Mead*, 405.

13. Against the latter and subsequent purchasers from him, such attachment is not constructive notice of a lien or of *lis pendens*. *Id.*

14. Third party, whose goods are seized under an attachment and sold under interlocutory decree, can, on dissolution of the attachment, sue the surety in the attachment bond for the true value of the goods less net proceeds of sale paid to him. *Straub v. Wooten*, 206.

15. Defendants, residing in Indiana, and owning stock in bank there, lodged certificate with blank power to sell, &c., with corporation in Connecticut as collateral for loan which its value considerably exceeded. Held, that their equitable interest could not be reached by foreign attachment in Connecticut. *Winslow v. Fletcher*, 734.

ATTORNEY. See **BILLS AND NOTES**, 25. **CORPORATION**, 24, 25. **EVIDENCE**, 14. **EXEMPTION**, 1. **INJUNCTION**, 2. **REMOVAL OF CAUSES**, 4.

1. Statements of client affording reasonable evidence of intent to commit a crime, are not privileged. *State v. Barrows*, 70.

2. Rule protecting privileged communications is one of public policy and not one of which only party making communication can claim the benefit. *Id.*

AUCTIONEER. See **BAILMENT**, 1-3.

AWARD. See **ARBITRATION**, 1.

BAILMENT. See **BANK**, 3, 4. **INNKEEPER**, 2. **SALE**, 4.

1. An auctioneer selling goods "as auctioneer," but without naming the person for whom he sells, is liable as if selling for himself, and if the title turns out defective, may be sued by the vendee, independently of implied warranty of title, in an action for money had and received, on the ground that the consideration has wholly failed. *Sermuller v. Fuchs*, and note, 250.

2. An auctioneer has all the liabilities of an ordinary agent. He is not, like a sheriff, a public officer. *Id.*

3. An auctioneer sold a piano at public auction, "as auctioneer," but without naming his principal. One with a superior title to the piano took it from

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the vendee, who sued the auctioneer to recover back the purchase-money. *Held*, that the auctioneer was liable. *Seemuller v Fuchs*, 250.

4. Where, by a contract of hiring the owner of a team sends his own servant to drive, he is only responsible for the acts of such driver in the handling of the team, while being used in the stipulated employment; and where team is lost while being used in a way, or at a place, or for a purpose not contemplated in the contract, the hirer cannot escape liability to the owner by showing that the driver consented to such use, or that the driver's negligence contributed to the loss. *De Voin v. Michigan Lumber Co.*, and note, 234.

5. A. hired his team and driver to B. to haul logs, and by direction of C., B.'s foreman, the driver went to haul hay. Under guidance of C., in going to a haystack, he drove over the snow-covered ice on the river, which broke through and the horses were drowned: *Held*, that B. was liable to A. for the value of the horses. *Id.*

BANK. See CONTRACT, 18. CORPORATION, 20, 23.

1. Issuing check, is primarily liable thereon. *Bank v. Anglo-American C.*, 85.

2. Taking certified check on another bank, as payment on account or for collection, can show check has availed nothing, when it has discharged its duty by an effort to collect check; but otherwise when it sends same directly to debtor bank for payment and debt is lost in consequence. *Id.*

3. Upon special deposit of money, bank is merely bailee and bound according to terms of deposit; but on general deposit, money becomes property of bank and depositors' claim is merely for like amount. *McLain v. Wallace*, 278.

4. General depositors of insolvent bank must be paid pro rata. *Id.*

5. Addition of word "clerk" to name of general depositor does not make deposit special or change liability of bank. *Id.*

6. Rule that trustee can follow trust property so long as it can be traced, has no application in action to recover money on general deposit. *Id.*

7. Depositor whose pass-book is written up from time to time, and checks paid returned, is bound to examine account within reasonable time and report to bank errors or omissions. *Bank v. Morgan*, 343.

8. Where altered checks have been paid, if bank's officers, by proper care and skill, could have detected the forgeries, it cannot receive a credit for amount of those checks, even if depositor omitted all examination of his account. *Id.*

9. The required examination can be made for depositor by competent clerk; but if agent who examines account committed the forgeries, principal must at least show reasonable diligence in supervising agent's conduct. *Id.*

10. Contract between cashier of bank and defendant, whereby defendant was to buy railroad stock for cashier with money of the bank to be advanced by cashier, for which defendant's note with said stock as collateral was to be given the bank, was contrary to rules of bank and amounted to misappropriation of its funds for which both cashier and defendant are liable. *Bank v. Hartridge*, 278.

11. The knowledge of cashier in such transaction was not the knowledge of bank. *Id.*

12. President of bank cannot make valid contract between it and third party for whom he also acts as agent in the transaction. *English v. Bank*, 278.

13. Where Coker, who was president of bank, and English agreed with bank in writing, to become guarantors for safe return of certain jewelry to bank by Sharpe, and by such return agreement was abrogated, it was not subsequently revived by note of English to Coker, authorizing him to make any arrangement with Sharpe, for Coker and English, by which Sharpe might take the goods, and an arrangement by which Sharpe was allowed by Coker to take the goods, giving a receipt to Coker and English therefor, and Coker bound himself verbally to the bank to be jointly responsible with English for their safe return. *Id.*

14. Where depositor drew check in favor of another before service of process on bank attaching depositor's funds, and same was paid by bank after service of writ and charged to account of depositor, *held*, that bank was entitled, as

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garnishee, to credit for check so paid. *Bank of America v. Indiana Banking Co.*, 277.

15. *Aliter*, had check been drawn after service of process on garnishee. *Id.*

16. Where depositor endorsed promissory note of third party and discounted same in bank where he had funds to his credit, *held*, that a payment of the amount due on such note by the endorser to the bank, out of his funds on deposit, after service of garnishee process on bank at suit of creditor of such endorser, could not be allowed bank as a set-off, the endorser's liability to the bank being contingent. *Id.*

17. If a depositor draws check on his banker, who has funds to cover it, it operates to transfer the sum named in check to payee, who may sue for and recover same in his own name. *Id.*

18. It is as lawful for an attachment debtor to draw his check in favor of the garnishee with whom his bank account is kept, as in favor of any one else, if done in good faith before the service of process, and the garnishee will be entitled to credit for the amount named in the check in the absence of fraud. *Id.*

19. A check drawn by a depositor in the state of Indiana, on his banker, payable in Illinois, will be construed by the laws of Illinois, and operate to transfer the sum named therein in accordance with such laws, notwithstanding a different rule obtains in the other state. *Id.*

20. In suit against firm of private bankers on note given by their cashier for money borrowed by him in firm name and appropriated to his own use, which turned on his authority to give the note, evidence of custom of bankers at that place to borrow money on time properly admitted as tending to show that act complained of was within scope of defendant's ordinary business. *Crain v. Bank*, 278.

21. In same suit it was *held*, a paper directed to distant bank giving signatures of persons authorized to sign for defendants, one of which was in handwriting of cashier, and another, that of one of defendants, was evidence of an admission by defendant so signing of cashier's authority to execute note in firm name. And the fact that payee of the note did not act on faith of such paper, though detracting from its weight, did not render it irrelevant and improper. *Id.*

22. The fact that cashier of private bank gave notes of other persons of his bank, amounting to over \$5000, as collateral, to secure note of that amount given by him in name of his principals, with usual power of sale, &c., not sufficient to affect party making the loan with notice of cashier's lack of authority to execute the note or of fraud in giving it. *Id.*

BANKRUPTCY.

1. New promise to pay debt discharged by bankruptcy is not an original contract but revives the old debt. *Nowland v. Lanagan*, 206.

2. Fact that assignee has not recovered property assigned or realized its money value, within time limited by bankrupt laws does not give bankrupt or his creditors right to recover property. *Mount v. Manhattan Co.*, 608.

3. Assignee not compelled to accept property which is onerous, and will yield nothing toward payment of debts. *Glenn v. Howard*, 735.

4. Discharge in bankruptcy no bar to action for subscription to stock of incorporated company called after discharge, though bankrupt was stockholder at time of bankruptcy. *Id.*

5. Where suit was commenced in state court, prior to filing by defendant of petition in bankruptcy, on a debt provable, but not proved, thereunder, and judgment was obtained thereon subsequent to granting of discharge to said bankrupt, *held*, in suit on said judgment in another state that discharge could not be pleaded as bar thereto. *Dimock v. Revere Copper Co.*, 405.

6. After sale of land by assignee has been confirmed and lands conveyed, U. S. Circuit Court has no jurisdiction at suit of purchaser to enjoin sale of same land upon order of state court upon judgments in suits commenced by attachment of the land a few days before defendant was adjudicated a bankrupt. *Sargent v. Belton*, 71.

BENEFICIAL SOCIETY. See **INSURANCE**, 17, 18, 24.

BILL OF LADING. See **BILLS AND NOTES**, 15, 16, 19. **COMMON CARRIER**, 20, 21. **INSURANCE**, 7. **SALE**, 11.

BILLS AND NOTES. See **ACCORD. ASSIGNMENT**, 4, 5. **BANK**, 20, 22, **CONTRACT**, 17, 18. **FRAUDS, STATUTE OF**, 1. **GIFT**, 1. **LIMITATIONS, STATUTE OF**, 1, 2. **MORTGAGE**, 29.

I. Form, Consideration, &c.

1. Production of bill with alteration apparent upon its face makes *prima facie* case for acceptor alleging material and unauthorized alteration since acceptance. *Harris v. Bank*, 736.

2. Contracts for the purchase and sale of cotton "futures" are illegal, and evidences of debt executed on such consideration are void, even in hands of purchaser for value without notice. *Bank v. Cunningham*, 138.

3. Brokers cannot recover for services rendered in a gambling transaction. *Id.*

4. A promissory note reciting "we promise to pay," and signed "D. P. Livermore, Treas'r, Hallowell Gas-Light Co.," is the note of the individual and not of the corporation. *McClure v. Livermore*, 792.

5. An action on such a note against the corporation, and its default, will not estop owner from maintaining action against the individual, when it does not appear that acts of plaintiff caused defendant to change his position, or to take some action injurious to himself. *Id.*

6. Bill of exchange payable 60 days after sight, was accepted "due twenty-first May," but without date of acceptance. *Held*, that in absence of affirmative proof that days of grace had been included, they must be allowed. *Bell v. Bank*, 71.

7. Surrender of old promissory note is sufficient consideration for new one executed by surety, although surety had been released from payment old note by action of insolvent principal, where both parties knew substantial facts, but, being ignorant of law, in good faith supposed surety liable for old note. *Churchill v. Bradley*, 671.

8. Drawee of bill of exchange drawn by "Kanawha and Ohio Coal Co.," was described in bill as "John A. Robinson, Agt.," and it was accepted by him as "John A. Robinson, Agent, K. & O. C. Co." *Held*, that acceptance was personal obligation of Robinson, and that in suit by endorsee against him parol evidence was not admissible in absence of fraud, accident or mistake, to show that defendant so accepted the bill intending to bind drawer as his principal, and that this fact was known to plaintiff at time it became owner and holder of it. *Robinson v. Bank*, 736.

9. Acceptor of non-negotiable draft, may pay same to payee, after maturity, without production and delivery of draft, provided acceptor has had no notice of transfer of draft by payee to third person; and such payment would be a valid defence against the note, should suit be brought thereon against acceptor by another person. *Johnston v. Allen*, 540.

10. In event of such suit by another person, burden of proof would be on plaintiff to show that defendant had notice of transfer before payment was made. *Id.*

11. Where party under arrest for embezzlement, gives draft for amount embezzled to person from whom it was embezzled, such draft is not invalid, unless given in consideration that prosecution should be suppressed. *Id.*

12. Where non-negotiable draft, valid in its inception, was loaned by payee to person under arrest for embezzlement, to enable him to compromise with party who caused his arrest, and such draft is transferred to such party, who brings suit thereon against acceptor, it is no defence that the holder received it in consideration of suppressing prosecution of party to whom it was loaned by payee. *Id.*

II. Rights of Parties.

13. If fraud in procurement of note be shown, *onus* is upon plaintiff to show that he is *bona fide* holder for value and without notice. *Crampton v. Perkins*, 736.

14. Evidence of parol agreement, prior to or at time of drawing and deliv-

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ering bill of exchange, that drawer is not to be liable as such, is inadmissible. *Cummings v. Kent*, 207.

15. Draft for sum stated, drawn by seller against buyer in favor of a national bank, by whom it is discounted or purchased, with bill of lading attached, passes title to goods therein mentioned to bank; and bank may recover them on dishonor of draft, from sheriff who had seized goods as property of seller under attachment subsequent to purchase by bank. *Bank v. Rowan*, 405.

16. Draft so drawn is a bill of exchange, and its purchase by a national bank is not beyond powers conferred on it by Acts of Congress. *Id.*

17. Where holder promissory note gratuitously permits it to run after maturity and subsequently on payment of part agrees to wait until maker can collect money with which to discharge balance, such maker is not estopped to set up a defence then existing, or which might thereafter arise, of which neither such maker nor holder had notice at time of agreement. *Henry v. Giltland*, 279.

18. To defeat clear defence to note, not payable in bank, in hands of assignee, on ground of subsequent contract to pay in consideration of extension of time, extension must be for definite time on valid consideration. Performance of plaintiff's part not sufficient to bind maker. *Id.*

19. Although contract between the parties may have been embodied in a draft, with bills lading attached, drawn in favor of plaintiff below, if proof shows borrower gave it with intent to defraud lender, and lender became aware of fact, it had right to repudiate draft as void and sue on the account for money loaned, and to put in evidence draft, bills lading, letters of drawer to drawees, and sayings of drawer showing intent to defraud. *Massengill v. First Nat. Bank*, 539.

20. Declaration upon a conditional acceptance must allege a performance of the condition. *Myrick v. Merritt*, 539.

21. Allegation of delivery of house, and that acceptor has been in possession, not sufficient allegation of performance of condition that house has been "finished according to contract and delivered," upon which draft is payable. Allegation that plaintiff, the payee, gave acceptor notice that he held himself ready to complete the house according to contract or to pay her a reasonable sum for his failure if she would point out deficiencies or omissions, and that she refused to do so or to permit him to enter house for purpose of completing it according to contract, is not sufficient averment of performance of conditions named in acceptance, whether considered alone or in connection with above allegation of delivery to and possession by acceptor. *Id.*

22. If, in any case of non-performance by drawer of conditions named by acceptor in acceptance, the payee has a right of action against acceptor who refuses to permit him to perform conditions, such action is not on the acceptance, but in case for damages. *Id.*

III. Endorsement.

23. If endorsee, before maturity, knew or was put on inquiry as to equity of maker, he takes *cum onere*. *Hulbert v. Douglass*, 343.

24. Where negotiable note is secured by mortgage, fact that one-half of land has been released, is some evidence to charge purchaser with notice of partial payment. *Id.*

25. Notice to attorney of any matter relating to business of client in which he is engaged, is notice to client. *Id.*

BOND. See DAMAGES, 1. GIFT, 1. INJUNCTION, 2, 5. MUNICIPAL CORPORATION, 22.

BROKER. See BILLS AND NOTES, 3.

BUILDING ASSOCIATION. See USURY, 3.

BURDEN OF PROOF. See BILLS AND NOTES, 10. COMMON CARRIER, 5. CRIMINAL LAW, 3. INSURANCE, 6. MALICIOUS PROSECUTION, 1. NEGLIGENCE, 3, 13. PRESUMPTION. TELEGRAPH, 2.

CASES AFFIRMED, COMMENTED ON, OVERRULED, Etc.

Burton v. Spiers, 87 N. C. 87; Duvall v. Rollins, 68 Id. 230; Crummen v. Bennett, Id. 494, cited and approved. *State v. Harper*, 347.

Cannon v. United States, 116 U. S. 55, judgment vacated and writ of error dismissed. *Snow v. United States*, 475.

Hoare v. Rennie, 5 H. & N. 19, approved. *Norrington v. Wright*, 21 Am. L. Reg. (N. S.) 395, affirmed. *Norrington v. Wright*, 47.

Hemenway v. Hemenway, 134 Mass. 446, distinguished. *Trust Co. v. Eaton*, 162.

Hernden v. Moore, 18 S. C. 339, distinguished. *Feldman v. Charleston*, 208.

Hough v. Railway Co., 100 U. S. 224, considered and applied. *Dist. Columbia v. McElligott*, 409.

Mersey Steel and Iron Co. v. Naylor, 9 App. Cas. 434, followed. *Blackburn v. Reilly*, 59.

Mitchell v. Darley Main Colliery Co., 24 Am. L. Reg. (N. S.) 432, and Brunsden v. Humphrey, Id. 269, criticized and distinguished. *City of North Vernon v. Voegler*, 101.

Patterson v. Wallace, 1 Macq. 748, and Hall v. Johnson, 3 H. & C. 589, compared. *Johnson v. Florence Co.*, 580.

Saxby v. Gloucester Wagon Co., 7 Q. B. Div. 305, referred to. *Gardner v. Herz*, 478.

Thomas v. Rd., 101 U. S. 91, reaffirmed. *Penn Co. v. St. Louis, &c., Rd.* 550.

United States v. Fisher, 109 U. S. 143, and United States v. Mitchell, Id. 146, distinguished. *United States v. Lungston*, 549.

Waters v. The People, 104 Ill. 544, distinguished. *Hong v. People*, 738.

CHAMPERTY.

The fact that a suit is being prosecuted under a champertous agreement between plaintiff and his counsel is no defence to the suit. Such irregularity can only be set up where it is sought to enforce the champertous agreement. *Bent v. Priest*, 115, and note.

CHARITY. See CORPORATION, 14. PUBLIC POLICY, 2, 3. TRUST AND TRUSTEE, 2. WILL, 6, 7.

CHATTEL MORTGAGE. See MORTGAGE, II.

CHECK. See BANK, 1, 2, 7, 8, 14, 15, 17, 19.

CITIZENSHIP. See REMOVAL OF CAUSES. UNITED STATES COURTS, 1. CITIZENSHIP, 1.

CITY. See MUNICIPAL CORPORATION.

COMMON CARRIER. See CONSTITUTIONAL LAW, 12, 13. RAILROAD, 4, 6. TELEPHONE, 1.

1. A railroad company is not a common carrier of express companies, i. e., a common carrier of common carriers. *Express Co. Cases*, 274. See *infra* 14.

2. A common carrier may, by contract, limit his liability as an insurer, but he cannot thus relieve himself from consequences of his negligence or fraud. *Rosenfield v. Ry. Co.*, 279.

3. Though common carrier may limit his liability by fixing value of goods, he must show this was done with knowledge of shipper, and for sufficient consideration, or that shipper's statements justified carrier in so fixing value. *Id.*

4. Burden is on carrier to show any limitation on his common law liability and contracts limiting amount of recovery are construed most strictly against him. *Id.*

5. In action against common carrier for loss of goods, where defence is that loss was occasioned by "act of God"—here extraordinary flood—burden of showing that negligence of carrier contributed with act of God to produce loss is on shipper. *Davis v. Rd. Co.*, 650, and note.

6. Defence of act of God may be shown under general denial. *Id.*

7. When goods are received by carrier to be transported beyond terminus of its line, and delivered at particular place and to particular persons, without

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more, he is responsible to consignor for their safe delivery. *Talvey v. Georgia Road*, 541.

8. To ascertain if any contract was made by first carrier to transport beyond its line, to place of destination, bill of affreightment may be looked to, and *alunde* evidence introduced, such as payment of all freight, way bill, &c. *Id.*

9. Condition in free pass that railroad company shall not be liable for injury caused by negligence of its servants, is reasonable, and will prevent recovery, even though passenger was a minor, and injuries were caused by gross negligence of the railroad employees. *Grinsold v. Railroad*, 196.

10. The plaintiff was employed by keeper of restaurant at railroad station, to sell sandwiches on train. While so employed he obtained the pass in question, to make a journey for his own pleasure. *Held*, that pass did not give plaintiff right of passenger for hire. *Id.*

11. Carriers of live stock are liable as common carriers and as insurers to same extent as carriers of merchandise, except as to injuries caused by animals to themselves or each other; losses caused by their inherent vices and propensities. *Railway Co. v. Lesser*, 541.

12. A common carrier cannot lawfully stipulate for exemption from responsibility for negligence of himself or servants, or insufficiency of cars for transportation of freight deposited in them. *Id.*

13. When shipper of live stock, in consideration of reduced rates, contracts with carrier, that in case of total loss of any of stock, the value of any animal should not exceed a certain sum, then in case of partial injury, the damages will be the proportion of that sum, the animal was lessened in value by reason of the injury. *Id.*

14. A railroad company performs its whole duty to the public at large, and to each individual when it affords the public all reasonable express accommodations; it owes no duty to the public as to particular agencies it shall select for that purpose, but may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security. *Express Company Cases, Legal Notes*, 274.

15. Is not bound to establish commutation rates for particular locality, but having done so must treat all alike. *State v. Railroad Co.*, 444, and *note*.

16. Commuter one day forgot his ticket, and tendered to conductor regular trip ticket, provided it should not be punched, and should be returned next morning on presentation of commutation ticket, and otherwise refused to pay his fare: *Held*, that relator made himself liable to ejection from train, and it may be to forfeiture of commutation ticket then held, but that company were not justified in refusing to sell him commutation tickets thereafter; and that for such refusal, mandamus would lie. *Id.*

17. Discrimination by, generally. *Id.*, *note*.

18. Carrier by water may deliver goods on wharf, but generally consignee is entitled to notice of their arrival. Notice, however, may be waived by previous dealing between the parties. *Turner v. Huff*, 540.

19. Carrier by water is not responsible for loss of goods delivered at landing place where consignee receives his goods, though there be no warehouse there and consignees have no notice of their arrival, if it be the uniform usage of carriers in same trade to leave goods at landing place, without notice, and the manner of delivery conforms to the custom of the locality; and this, whether shipper or consignee knew of usage or not. *Id.*

20. Stipulation in bill of lading that carrier shall have benefit of any insurance on the goods is valid, and in such case, even though loss be occasioned by negligence of carrier, insurance company cannot be subrogated to rights of shipper. *Insurance Co. v. Transportation Co.*, 330.

21. Where goods were shipped under oral agreement, with understanding that bills of lading would be subsequently issued, and afterwards, and after effecting of insurance by shipper, bills of lading were issued, containing provision giving to carrier benefit of any insurance on goods, which bills were not objected to by shipper, and were similar to other bills previously issued to him, contract of carriage is to be treated as if made on day of oral agreement and insurance company is bound by conditions of bills of lading. *Id.*

CONDITIONAL SALE. See **FIXTURES**, 1. **SALE**, 8, 9, 11.

CONFLICT OF LAWS. See **BANK**, 19. **CONTRACT**, 23. **CONSTITUTIONAL LAW**, 42-44. **CORPORATION**, 13, 18. **HUSBAND AND WIFE**, 7, 9. **INSOLVENCY**.

1. Validity of gift *causa mortis* is to be determined by law of place where made, without reference to domicile of donor. *Emery v. Clough*, 473.

2. If no place is agreed on for performance of contract, *lex loci contractus* governs. *Morris v. Hockaday*, 472.

3. Where bond was dated in North Carolina, but had no specified place of payment, *held*, that it was governed by usury laws of that state, although pleadings admit its delivery in Virginia. But *contra*, if bond was given for goods purchased in Virginia. *Id.*

4. *Quære*, whether parties can agree on rate of interest, legal where contract is made, but illegal where it is to be performed. *Id.*

5. Personal property of deceased person is to be administered according to law of his domicile. The law of country of which he is a subject regulates the succession. This law applies to mortgages on land as well as to other personality. *Thomas v. Morrisell*, 541.

6. Issues passed on by probate court of another state cannot be opened by proceedings in our courts substantially between same parties and involving same issue; and there is nothing in the question of domicile to take it out of the general rule. *Id.*

7. Defendant's discharge under insolvency law of Massachusetts, is no bar to suit in New Hampshire, on contract made in former state before insolvency, when plaintiff has not resided there since insolvency proceedings were begun, and has not submitted to the jurisdiction of the insolvency court. *Norris v. Atkinson*, 792.

8. Complainant in New Jersey court claimed as residuary legatee, part of fund in defendants' hands, under what complainant claimed was a void bequest. *Held*, that as testator was a non-resident, and his will had never been proved nor recorded in New Jersey, complainant was not entitled to relief, although bill states that fund is under control of defendants, who reside in New Jersey, and are executors of surviving executor of will in question. *Van Gieson v. Banta*, 207.

9. In suit by stockholders of foreign corporation against it and corporation to which it had leased its road, lands, &c., all of which were out of New Jersey courts' jurisdiction, seeking relief in regard to transactions of these corporations with each other, that court, on demurrer, declined to take jurisdiction on ground that courts of New York were proper forum. *Gregory v. Railroad Co.*, 207.

CONSIDERATION. See **COMMON CARRIER**, 10. **CONTRACT**, 18, 22. **FRAUDS, STATUTE OF**, 2. **INSURANCE**, 23. **PLEADING**, 2.

CONSPIRACY. See **INJUNCTION**, 6.

CONSTITUTIONAL LAW. See **CRIMINAL LAW**, 6, 9, 11, 15, 16. **ERRORS AND APPEALS**, 2. **HIGHWAYS, &c.**, 4, 5. **LIMITATIONS, STATUTE OF**, 13. **MUNICIPAL CORPORATION**, 14, 18. **RAILROAD**, 9. **REMOVAL OF CAUSES**, 2. **SLANDER AND LIBEL**, 7. **STATUTE**, 1. **TELEGRAPH**, 1. **TELEPHONE**, 2.

I. Powers of Legislature.

1. Statute authorizing executions against inhabitants upon judgments against towns is constitutional. *Eames v. Savage*, 71.

2. General Assembly under general grant of legislative power in constitution, has power to provide by reasonable and impartial statute for registration of voters. *Daggett v. Hudson*, 71.

3. Statute which authorizes seizure of intoxicating liquor, intended for unlawful use, in possession of express company, does not interfere with interstate commerce and is not in conflict with sect. 8, of Federal Constitution. *State v. O'Neil*, 671.

4. Provision in the 14th Amendment to Constitution United States, forbidding a state to deny to any person within its jurisdiction, equal protection of laws, applies to Southern and Central Pacific Railroad Companies. *Santa Clara Co. v. South. Pac. Rd.*, 541.

5. Law requiring liquor dealers to remove obstructions to clear view of pre-

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mises through window on Sunday is constitutional, though it does not define what constitutes an obstruction. *State v. Boyle*, 671.

6. Ordinance requiring street railroads to make quarterly reports of number of passengers, is not unreasonable or in restraint of trade, and is not in violation of art. 5 of Amendments to United States Constitution. *St. Louis v. St. Louis Rd.*, 609.

7. Where public officer has rendered services under law which fixes his compensation, a constitutional provision, passed afterwards, lowering limit of taxation, impairs obligation of contract by destroying remedy *pro tanto*. *Fisk v. Jurg*, 208.

8. Grant to corporation by legislature of Louisiana of exclusive privilege supplying New Orleans with gas for certain period is binding on state, and it cannot, either by its organic law or legislative enactment, impair the obligation of the contract. *Gas Co. v. Light Co.*, 139.

9. A state, by a statute subjecting railroads to double damages for failure to maintain fences and cattle-guards, does not deprive the companies of their property without due process of law, or deny them the equal protection of its laws. *Railway v. Humes*, 71.

10. Authority for imposing such duties as prescribed by the statute in question is found in the police power of the state. *Id.*

11. Act state legislature imposing tax on persons who, not having their principal place of business within the state, engage in selling or soliciting sale of certain liquors to be shipped into state, is unconstitutional, as in effect a regulation of inter-state commerce. *Walling v. State Michigan*, 279.

12. Provisions Pub. Stat. R. I. cap. 139, forbidding discriminations by common carrier in his charges for transportation, apply to contracts made in that state for transportation to points beyond state. *Coal Co. v. Rd.*, 671.

13. These provisions so applying are not in conflict with Art. I., sect. 8 of Federal Constitution. *Id.*

14. When railroad is built by corporations located in and chartered by different states and these corporations consolidate, they make but one corporation, whose acts and neglects are done by it as a whole. *Id.*

15. Act conferring certain corporate powers on cities of first grade of first class is general, and is not in conflict with constitutional prohibition against passage of special acts conferring such powers. *State v. Hawkins*, 473.

16. Power conferred on governor of state to remove members of board of police commissioners, is administrative and not in conflict with clause of constitution conferring judicial power on the courts. *Id.*

17. Where charges embodying facts that in judgment of law constitute official misconduct, are preferred to governor, of which notice is given to members charged, and he, acting upon charges so made, removes them from office, his act cannot be reviewed, or held for naught on proceeding in *quo warranto*. *Id.*

18. Statute providing for appointment in city of board of four commissioners to take charge of elections, two members thereof to be selected from each of the two leading political parties of the city, such board to appoint registers, inspectors and clerks of election from each of the two leading political parties, is unconstitutional, as requiring an unlawful test for holding of public office. *Attorney-General v. Detroit*, 34, and note.

19. Party representation being main object of such law, court cannot treat it as not essential and sustain commission by allowing selection of its members without such test. *Id.*

20. Creation by statute of board of commissioners for city, having control of municipal elections and appointment of election officers, is unconstitutional, as being a delegation of governmental powers. *Id.*

21. Legislature has no power to levy taxes for private purposes, and bonds issued by city to be lent to applicants who will build up waste places and burnt districts of the city are not valid obligations. This case distinguished from cases sustaining local taxation in aid of railroads. *Feldman v. Charleston*, 206.

22. Statute forbidding and punishing sale of adulterated milk provided that, in all prosecutions, if the milk be shown, upon analysis, to contain more than 88 per cent. of watery fluids, or less than 12 per cent. of milk solids, or less

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than 2½ per cent. of milk fats, it should be deemed adulterated, held constitutional. *State v. Groves*, 344.

23. Act establishing reform school in all counties in which is located city of over 50,000 inhabitants, violates provisions of constitution of Missouri against passage of local or special laws. Court takes judicial notice of census returns, and it is found that Jackson county is only county in state to which the law could apply, or was intended to apply. *State v. County Court*, 609.

24. Where journal of each house of general assembly shows that a law received concurrence of requisite number of members and was publicly signed by presiding officers as also required, its authenticity cannot be impeached by parol evidence that one or more members recorded as concurring and whose concurrence was necessary, had, prior to adoption of law, been seated upon determination of contested election, by less than constitutional quorum. *State v. Herron*, 737.

25. Sects. 5 and 6 of Art. 11 of Military Code of Illinois, prohibiting any body of men, other than organized militia of state and United States troops, from parading with arms in any city without a license from the governor, do not infringe right of people to bear arms, and clearly do not conflict with Second Amendment to Constitution of United States. *Presser v. Ill.*, 207.

26. The right to associate as a military company and parade with arms, not having been specially granted by congress or the state, is not an attribute of national citizenship protected by 14th Amendment to National Constitution. *Id.*

27. Requirement that each vessel passing a quarantine station shall pay fee fixed by statute for examination as to her sanitary condition and the ports from which she came, is a part of all quarantine systems, and is a compensation for services rendered vessel, not a tax within meaning of constitution concerning tonnage tax imposed by the states. *Steamship Co. v. Board of Health*, 542.

28. Nor is it liable to constitutional objection as giving a preference for port of one state over those of another. Sect. 9, art. 1st of Constitution is a restraint on powers of general government and has no application to quarantine laws of Louisiana. *Id.*

29. Where state constitution provides that every white male citizen who shall have resided in state for certain period preceding election, shall have right to vote, any law which requires previous registry of citizen as prerequisite to right to vote is unconstitutional and void. Such a law is not rule of procedure, but legislative condition attempted to be attached to exercise of constitutional right. *White v. County Judge*, 636, and note.

30. Act of legislature directed that all property of railroad and canal companies used for railroad or canal purposes, including their franchises, should be assessed for taxation in manner which differed materially both in ascertaining values and in rate of tax from assessment of similar property not used for such purposes. *Held*, that act did not contravene requirement of state constitution that "property shall be assessed for taxes under general laws and by uniform rules according to its true value." *Board of Assessors v. State, Legal Notes*, 666.

31. The words "due process of law," in the constitutional provision, "that no person shall be deprived of life, liberty or property, without due process of law," means general public law binding on all members of the community, under all circumstances, and not partial or private laws affecting the rights of private individuals or classes of individuals. *Millet v. The People*, 785.

32. So far as the owner or operator of a mine shall contract for mining or selling of coal by weight, there is no constitutional objection to the statutes imposing upon him the duty of procuring scales for that purpose; but so much of the act of 1885 as provides that all contracts for the mining of coal in which the weighing of the coal, as provided for in that act, shall be dispensed with, shall be null and void, is in violation of the constitution. *Id.*

33. Such legislation for this particular class cannot be sustained as an exercise of the police power. *Id.*

34. Sect. 29, art. 4, of the constitution of Illinois, which enjoins legislation in the interest of miners, means legislation for the personal safety of miners,

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and relates only to the enactment of police regulations to promote that end. *Millat v. People*, 785.

35. The legislature has not the power to require the owners and operators of coal mines in this state to furnish scales, and employ a person to use them and keep books of entries of weights, for the benefit or information of the public, without first making compensation to the owners, that being tantamount to an appropriation to public use of private property, which is the cost of the scales, and a clerk to keep the books. *Id.*

36. Ordinances of San Francisco forbade any person to carry on laundry without consent of board of supervisors, except in brick or stone buildings. There were at the time about 320 laundries in San Francisco, of which about 240 were owned and conducted by subjects of China, and about 310 were made of wood, the same material that constituted about nine-tenths of the houses in San Francisco. All petitions of Chinese were refused, and all others, except one, were granted. *Held* (1), That provisions of 14th Amendment to Constitution of United States, are universal in their application, to all persons within territorial jurisdiction; and equal protection of laws is pledge of protection of equal laws. (2) That ordinances were so administered as to amount to practical denial by state of that equal protection of laws. *Yick Wo v. Hopkins*, 473.

37. *Semble*, That ordinances in question were void from their terms because they compelled men to hold their means of living at mere will of another, differing from case where discretion is lodged in public officers to grant or withhold licenses, &c. *Id.*

38. LEGISLATION IMPAIRING THE OBLIGATION OF CONTRACTS, 81.

39. THE CONSTITUTIONAL OBJECTIONS TO RETROSPECTIVE AND EX POST FACTO LAWS, 681.

II. Powers of Judiciary.

40. Where by law of state in which judgment has been obtained in suit against joint defendants, one of whom only was served, judgment is valid against defendant served, an action can be maintained thereon against him in courts of another state. *Harley v. Donoghue*, and *Renard v. Abbott*, 208. See *Legal Notes*, p. 341.

41. When court of one state, in order to give full faith and credit to judgment rendered in another, must ascertain effect which it has in that state, the law of that state must be proved, like any other matter of fact; and consequently an allegation in declaration of such effect is admitted by demurrer. *Id.*

42. A United States Circuit Court has jurisdiction on *habeas corpus* to discharge from custody a person restrained of his liberty, in violation of the Constitution of the United States, although he is held under the authority of the state. *Ex parte Royall*, 344.

43. Where such a restraint is claimed, the United States Court has a discretion (to be subordinated to any special circumstances requiring immediate action) to proceed at once or await the result of his trial, and after trial it has still a discretion whether the accused, if convicted, shall be put to his writ of error. *Id.*

44. Upon construction of constitution and laws of a state, the Supreme Court United States, as a general rule, follows decisions of highest court of state, unless they conflict with or impair the efficacy of some principle of federal constitution, or of federal statute, or a rule of commercial or general law, on many subjects they are necessarily conclusive, such as relate to existence of her subordinate tribunals, and the eligibility of their officers, and passage of her laws. *Norton v. Shelby Co.*, 542.

45. On grounds of public policy, validity is frequently given to acts of officers *de facto*, but there can be no officer *de facto* or *de jure*, if there be no office to fill, and an unconstitutional act can create no office. *Id.*

46. In an action of ejectment the judgment turned on validity of sale of land by guardian of plaintiff. It appeared, that all proceedings for sale were regular save that no bond was entered by guardian, as statute provided, which court held did not avoid sale. This judgment was appealed from to highest state court, it being averred among other assignments of error, that plaintiff in error

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was deprived of his property without due process of law. The court affirmed the judgment of the court below, but took no notice of this assignment: *Held*, that the judgment, nevertheless, involved the decision of question whether there had been denial of right so claimed, and therefore, Supreme Court United States had technical jurisdiction; but judgment was so clearly correct that motion to affirm should be granted. The failure to enter the bond was at most an error of the court. A state cannot be deemed guilty of violation of constitutional obligation referred to, because one of its courts, while acting within its jurisdiction, has made an erroneous decision. *Arrowsmith v. Harmoning*, 542.

III. *Eminent Domain*.

47. Land may be taken for public cemetery, even though expense may exclude some. *Association v. Beecher*, 737.

48. In proceedings to condemn strip of land for railroad track, which crossed a pond, supplying owner's steam mill with water, on question of damages to mill property not taken, defendant gave estimates on basis that pond would be destroyed as water supply to mill, and that there would be no other source of supply. Petitioner then offered to show that certain water-works would furnish mill regularly with all the water it might require at less cost than that of pumping from the pond, and also that a creek flowing nearer the mill than the pond, had a capacity to furnish better water in abundance for the use of the mill, which the court refused to admit. *Held*, that the court erred in excluding the evidence. *Railroad and Coal Co. v. Switzer*, 793.

CONTEMPT. See HABEAS CORPUS, 2.

1. Where order issued against foreign corporation, defendant, to show cause why it should not be punished for contempt, and the agent of said corporation who was designated by it in accordance with law of state where suit was brought as person on whom process may be served, purposely avoided being served with said order; and an order was entered that service be made upon "the attorneys of record herein of said defendant:" *Held*, that such service was valid. *Land Co. v. Yuba County*, 280.

2. Defendant in suit procured postponement through counsel on ground that he was too ill to attend court. Plaintiff's counsel, suspecting deception, applied for an attachment for contempt. An order to show cause was issued and served, but defendant did not appear; his counsel appeared for him and filed answer, asserting his illness and disclaiming intention to disobey court. To this plaintiff filed no reply. A hearing was then had in absence of defendant against protest of his counsel, and court found him guilty and sentenced him to pay fine and costs, the latter taxed as in an ordinary civil suit. *Held*, 1. That court below having found defendant's conduct to be a contempt, appellate court could not, as matter of law, say it was not so. 2. The contempt not being committed in its presence, court could only find defendant guilty on regular proof, making a trial necessary. 3. That as the contempt was a criminal one, a civil proceeding for its punishment was irregular; and that the proceeding should have conformed as nearly as possible to those in criminal cases. 4. That court could not proceed in defendant's absence, and that he had a right to be heard. 5. That affidavits were improperly admitted as evidence on the trial; also, a deposition taken on part of plaintiff. *Welch v. Barber*, 72.

CONTRACT. See ACTION, 6. BANK, 10-13. BILLS AND NOTES, 21. COMMON CARRIER, 2-4, 8, 12. CONFLICT OF LAWS, 2-4. CONSTITUTIONAL LAW, 7. CORPORATION, 30, 32. DAMAGES, 10, 11. EQUITY, 17, 18, 20, 22. EVIDENCE, 21. FRAUDS, STATUTE OF, 7. HUSBAND AND WIFE, 15. INFANT, 4, 5. INSURANCE, 25, 26, 28. PARTNERSHIP, 3. PUBLIC POLICY, 1. RAILROAD, 13, 14. SALE, 5, 7, 11-14. SET-OFF, 3. SHIPPING, 1, 2. SPECIFIC PERFORMANCE. TELEGRAPH, 8. UNITED STATES, 1.

1. When written agreement consists of more than one distinct writing, all the parts should be given due weight. *The Cin., &c. Co. v. The Ind., &c. Co.*, 474.

2. Mere bid in answer to advertisement for proposals for building does not constitute. Conditional acceptance, such as requiring bond, delays completion of contract until condition is complied with. *Howard v. Maine School*, 609.

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3. Where corporation acts through building committee, majority must concur in making or varying contract. *Howard v. Maine School*, 609.

4. An offer made in Boston, Mass., and to stand until next day, was accepted by telegram from Providence, R. I. Held, that contract was completed in Rhode Island, though to be performed in Massachusetts. *Perry v. Iron Co.*, 671.

5. A contract between physician and person injured by railroad company that physician shall explain to company's counsel and medical adviser the nature of injuries, and be paid for such service a sum graded by amount received from company is illegal and void. *Thomas v. Cawdett*, 133, and note.

6. Under a contract to deliver 5000 tons of rails, to be shipped at rate of about 1000 tons per month, seller's failure to ship required quantity in first month gives buyer right to rescind whole contract. *Norrington v. Wright*, 47, affirming same case 21 Am. L. Reg. (N. S.), 395.

7. Upon contract of sale to be performed by a series of deliveries and payments at stated intervals particular defaults by one party will not release the other, unless conduct of party in default be such as to evince intention to abandon contract. *Blackburn v. Reilly*, 59.

8. One partner agreed in writing to sell to a copartner his interest in company's property, consisting of store and stock of goods, worth \$25,000, on certain terms, with proviso, that whichever broke the contract, should forfeit to the other \$500. Held, that \$500 were intended by parties as liquidated damages. *Maxwell v. Allen*, 542.

9. To constitute contract of sale of land by acceptance of offer to sell, acceptance must be unconditional, not "provided the title is perfect." At any time before unconditional acceptance of offer and compliance with its terms it may be withdrawn. *Corcoran v. White*, 737.

10. Offer in writing to subscribe to capital stock of railroad company, conditioned upon construction of its road along designated route, is revocable until delivered to and accepted by such company; death of party works such revocation. *Wallace v. Townsend*, 73.

11. Contract giving party right to use fence of race course for advertising purposes for period of years, confers right to use inside as well as outside of fence, and includes right of entry on premises to reach inner surface of fence, which latter right is not a mere revocable license, but a right of way in gross. *Wil'oughby v. Lawrence*, 672.

12. The fact that a regular practising physician failed for a short time to register under sect. 1409, *et seq.*, Illinois Code, owing to no book having been provided for the purpose, will not defeat his right to recover for professional services rendered during that period. *Parriah v. Foss*, 140.

13. G. wrote to nephew in Germany that if he would come to this country and take care of him and wife, who were childless, he would leave him all his fortune. Nephew came and took care of uncle and aunt for ten years, when uncle died. Held, that this constituted a contract enforceable by nephew against legatees and representatives of uncle, claiming under will which made no provision for nephew. *Schutt v. Miss. Soc.*, 610.

14. Railroad company contracted to give B. certain rights "over its entire line of railway, and on all roads which it controls or may hereafter control by ownership, lease or otherwise." Held, that though railroad company, by owning a majority of stock of another railroad company, may have all the advantages of a control of the road, yet that is not the control itself within the meaning of the contract. *Car Co. v. Rd.*, 140.

15. Where an employee, engaged under a contract for a specified time, the wages being payable in instalments, is wrongfully discharged before expiration of period of hire, and all wages actually earned at time of discharge have been paid, an action will not lie to recover future instalments as though actually earned, but remedy is by action for damages for breach of contract, and one recovery on such claim is bar to future action. *James v. Commissioners Allen Co.*, 521. and note; *also* 409.

16. The duty to perform a positive promise which is not contrary to law or public policy, or obtained by fraud, imposition, undue influence, or mistake, is

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an obligation in morals, and being so, it is sufficient consideration for express promise. *Bentley v. Lamb*, 632, and note.

17. A. gave B., who had been in his employ for years, due bill for \$3000, payable one year after his death. This was given in pursuance of agreement, wherein he agreed to do so, and stated that it was as additional compensation for services rendered. A. died, and suit being brought on due bill, his executors set up want of consideration. *Held*, that services rendered, though partly paid for, were sufficient consideration for due bill. *Id.*

18. Treasurer of savings bank made his note to bank for \$2000, and secured it by assignment of insurance policy on his own life, for purpose of making up to bank, a loss on loans for which he was neither morally nor legally responsible. Note and policy were found by trustees of bank after treasurer's death, which was first they knew of them. *Held*, 1. That note was without consideration and void; 2. That assignment of policy was void for want of delivery. *Bank v. Copeland*, 72.

19. Plaintiff contracted to build house for defendant by time certain, for \$2250, of which \$500 was to be paid in advance, and balance to be raised by mortgage on house, which was to be negotiated by plaintiff. He failed to negotiate mortgage and to complete house by time specified, but was allowed to continue work for two months after, when defendant took possession and finished it. *Held*, that defendant waived materiality of time; that by stopping plaintiff she virtually refused to permit him to raise money by mortgage; that defendant cannot complain that jury were instructed that plaintiff could recover what his labor and materials were worth to defendant, because she admitted, if liable, that this was correct rule, and no exception was taken to the charge as to damages. *Foster v. Worthington*, 672.

20. A. agreed to sell B. a quantity of corn at a stipulated price, to be delivered at a day named, and B. promised to make advances on the contract to A., of what money he might require. In a suit on the contract for non delivery of corn, it was *held*, that evidence of a custom requiring the vendor to give to vendee his note, on receiving such advances, was inadmissible on behalf of B., as inconsistent with the express contract. *Gilbert v. McGinnis*, 139.

21. Contract for sawing and delivery to purchaser, of lumber, provided that he should measure same when delivered, and pay for only such as was absolutely clear and suitable for certain purpose. *Held*, that while it gives buyer right to pass upon quality of lumber, it does not make his decision beyond review. He is bound to receive and measure such lumber as complies with contract, although in his judgment, it is not of proper quality; and testimony of witnesses who saw lumber after it was sawed, in the timber, and when it was being shipped, is admissible to show its quality when delivered. If injured while being shipped, such fact might be shown. *Mulliner v. Bronson*, 280.

22. A. having *bona fide* claim against C., placed it in hands of attorney for collection, who exhibited it both to C. and to B., his father, and informed them of consequences of suit, which he was instructed to institute. Afterwards, B. obtained bill of sale from son, of all his property, and upon being told by A., that he was going to send sheriff up "that day;" that he was not going to stop for bill of sale, "it was a fraud," replied "you keep quiet and you will get your money; I guess I am worth it." A., relying on promise of B., left him and immediately stopped further proceedings: *held*, that the forbearance to sue constituted sufficient consideration for B.'s promise, and A. was entitled to recover against him. *Bowen v. Tipton*, 344.

23. Plaintiff sued in assumpsit to recover balance due for services, advances and interest on purchases and sales of stock. Both plaintiff and defendant resided in York, Pa., where former conducted business of banker and broker. Plaintiff bought and sold for defendant, on margin, in markets of New York, Baltimore, Chicago and Philadelphia. Defendant pleaded specially that by law of Pennsylvania, where contracts were made and to be performed, they were gambling transactions and void. *Held*, 1. That it was competent for defendant to show that, although in form the transaction was perfectly legal, it was in fact a mere guise under which a gambling transaction might be conducted. 2. That although plaintiff acted merely as defendant's broker and was suing not on the contracts themselves, but for services performed and money advanced for de-

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defendant, he stood in same position as if seeking to enforce original agreement and could not recover for services rendered in forwarding a gambling transaction. 3. As to the *locus* of the transaction, jury should have been given the law of Pennsylvania as comprised in the decisions of that state bearing on wagering contracts within its limits. 4. That action being for services rendered defendant, it was plaintiff's relations with him on which the suit was based; and parties with whom he dealt in making purchases and sales were nowise connected with the suit. 5. That validity of transaction was to be tested by Pennsylvania cases, according to which, if, as defendant claimed, the understanding between plaintiff and defendant was that no stock should be delivered, but a mere settlement of differences made, the transactions were wagers and no recovery could be had by plaintiff. *Stewart v. Shall*, 796.

CONTRIBUTION. See **COSTS**, 2.

CONTRIBUTORY NEGLIGENCE. See **NEGLIGENCE**.

CONVERSION. See **WILL**, 15.

COPYRIGHT.

1. The judges and reporter being paid by the state, it can copyright their work and say when and in what manner the decisions of the court shall be published. *Gould v. Banks*, 738.

2. The courts and their records are open to all; but the judges' opinions are not part of the records, and are accessible to all who desire to use them to enforce their rights. *Id.*

3. If owner of subsisting copyright seeks to enjoy exclusive right of selling published work by making sales directly and only to individual subscribers, the statute protects his monopoly from interference by other dealers offering surreptitiously obtained copies of genuine work, without his consent, unless there be something in circumstances of particular case to estop him from relying on privileges of his monopoly. *Publishing Co. v. Smythe*, *Legal Notes*, 668.

CORPORATION. See **ATTACHMENT**, 2-5. **CONSTITUTIONAL LAW**, 4. **CONTRACT**, 3. **EQUITY**, 3. **INSURANCE**, 1. **MALICIOUS PROSECUTION**, 2. **MADAMUS**, 8. **MORTGAGE**, 7. **NEGLIGENCE**, 17. **PUBLIC POLICY**, 2, 3. **RAILROAD**, 7. **SALE**, 10. **WILL**, 6, 7.

1. Corporation colorably organized, incurred debts, on which judgments were recovered. After incurring those debts organization was perfected and mortgages given. *Held*, that judgments had precedence. *Bergen v. Porpoise Co.*, 610.

2. Where a director receives property for his vote on a proposed contract with the corporation, he is a trustee for such property, and it may be recovered from him in a suit by a receiver of the corporation. *Bent v. Priest*, 115, and *note*.

3. In constructive trusts arising from fraud, if the facts constituting the fraud are open, the Statute of Limitations commences to run at once; but if the facts are secret the statute does not commence to run until their discovery. *Id.*

4. Turnpike company which collects tolls is directly liable to those who travel upon it, for injuries occasioned by want of repair of road, without any express statutory provision. *Turnpike Road v. Crowther*, 73.

5. Where differences in grade exist, company is bound to make safe and convenient turnouts to side roads, and where they are necessarily dangerous to provide proper safe guards. *Id.*

6. Capital stock cannot be reduced except by express legislative authority. *Seignouret v. Home Ins. Co.*, 29, and *note*.

7. Such authority is not conferred by statute authorizing stockholders to make modifications, additions or changes in their act of incorporation, or to dissolve it, with assent of three-fourths of stock. *Id.*

8. *Semble*, that writing off the value of shares so that par value and estimated value may be equal, the actual capital not being affected, can only be accomplished by consent, or clear power given in charter. *Id.*

9. New Jersey statute of 1880, authorizing any railroad to lease or merge with

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any other, does not authorize such lease by directors against minority of dissenting stockholders, so far as latter's rights are affected. *Mills v. Central Rd.*, 610.

10. Provision of general corporation act that charters thereafter granted shall be subject to alteration, suspension or repeal, in discretion of legislature, does not incorporate act of 1880, *supra*, in defendant's charter so as to injuriously, affect stockholder's vested rights. *Id.*

11. Where there is no legislative authority for ascertaining damage inflicted upon dissenting stockholders by majority delivering their vested rights by illegal lease, and awarding them compensation therefor, court will annul lease and restore complainants to original position. *Id.*

12. The mere granting of a charter, it not appearing on the face of the incorporating act or otherwise, that the named corporators had applied for it or accepted the grant, does not create a corporate body. *Smith v. Mining Co.*, 280.

13. A charter can be accepted and the corporation organized only within the limits of the state creating it; and this rule should be enforced in the tribunals of the state in which the unauthorized acts were done or the suit was instituted, as well as by the courts of the incorporating state. *Id.*

14. Upon dissolution of corporation (other than moneyed, trading or municipal corporation) by expiration of charter, all of its property not validly alienated before dissolution reverts to the grantor. *St. Philip's Church v. Zion Church*, 406.

15. Where corporation having no adopted seal, directed conveyance made of lot of ground, and deed was executed, purporting to be under seal of corporation, attested by its president, and was signed by such president, and a wafer was attached, intended as seal of the corporation: *Held*, that the wafer was the corporate seal to this deed. *Id.*

16. Allegations in bill that company is insolvent and has suspended business for lack of funds, not sufficient to have corporation declared insolvent and receiver appointed; facts must be set out from which insolvency shall appear. *Construction Co. v. Schack*, 140.

17. Sections 16, 34 and 57, of Corporation Act of New Jersey (Rev. p. 182) construed. *Id.*

18. Courts of Maryland will not interfere in controversies relating only to the internal management of affairs of foreign corporation. Such controversies must be settled by courts of state creating the corporation. *Mining Co. v. Field*, 280.

19. Where act of foreign corporation affects one solely in his capacity as a member of the corporation, such act may be said to relate to the management of the internal affairs of corporation; but it is otherwise where it affects his individual rights only. *Id.*

20. Bill by "Drummond Tobacco Co.," to enjoin incorporation of another company in same city as "Drummond-Rundle Tobacco Co.," will not be sustained unless evidence satisfies mind of chancellor that plaintiff would thereby be injured in its business. *Drummond Tobacco Co. v. Rundle*, 289.

21. So the use of any particular name by a corporation will not be enjoined unless it is clearly shown that complainant will probably be injured thereby. *Id.*

22. The directors of a savings bank, though unpaid, are responsible for want of ordinary care and being regarded as trustees for depositors, the statute of limitations is no bar to an action against them for mismanagement. *Williams v. McKay*, 141.

23. Where bill filed shows systematic violation of charter by president, it raises a *prima facie* presumption that directors were aware of the fact and the latter cannot demur on ground that misconduct is not traced to them. *Id.*

24. Where by-laws of private corporation for profit, make it duty of president to exercise general supervision over its entire business, and provide that all company's property shall be under his control, and such president for number of years before, had acted as its attorney, there will be evidence of his authority to employ attorneys to appear, &c., for corporation. *Wetherbee v. Fitch*, 738.

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25. Attorney must have special authority to compromise a suit; but accepting benefit of settlement may ratify it. *Wetherbee v. Fitch*, 738.

26. Where charter authorizes purchase of land for certain purpose, in absence of evidence it will be presumed that any land purchased was for authorized purpose. *Mallet v. Simpson*, 344.

27. Where charter of railroad company authorized purchase of land for procuring stone and other materials necessary for construction of road or effecting transportation thereon, *held*, that charter authorized purchase of land to get cross-ties and fire wood. *Id.*

28. Statutes of mortmain were never adopted in North Carolina. *Id.*

29. Conveyance to corporation of land which its charter forbids its holding or taking title to, is valid until vacated by direct proceedings instituted by the sovereign for that purpose. *Id.*

30. Secret agreement made with subscriber to stock of railway corporation, who subscribes with others, that he shall pay only part of his subscription, is fraudulent as to other subscribers and his subscription will be binding for whole amount. *Railroad Co. v. Ennor*, 672.

31. Subscription to railway company to take certain number of its mortgage bonds, containing clause that it is not to be binding, unless one hundred bonds are subscribed for, is not binding until that number are so subscribed. *Id.*

32. A subscription payable when company's road should be graded to a certain point, to be in force only until a day named, cannot be enforced without performance of condition. *Id.*

33. As a rule, officers of corporation are sole judges of the propriety of declaring dividends, but where right to dividend is clear, court of equity will compel its declaration. *Belfast Co. v. Belfast*, 73.

34. Where the papers by which an attempt is made in good faith, to organize a private corporation have gone through the public offices, and there has been uninterrupted and unchallenged user for a number of years, and valuable rights in good faith acquired, enjoyed and disposed of by such organization, it is a corporation *de facto*, and its corporate capacity cannot be questioned in a private suit to which it is a party. *Society v. City*, 73.

35. A judgment of ouster against pretended corporation by reason of defective proceedings of incorporation, is not retroactive upon rights acquired, &c., in transactions in good faith with such acting corporation. *Id.*

36. A statute provided that members of every incorporated manufacturing company should be liable for all debts of corporation until capital stock was paid in and certain certificates filed. *Held*, that liability extended to all holding stock when debt was contracted, and also to all who were stockholders when liability was enforced, but not to those buying stock after debt was contracted and selling same before liability was enforced. *Sayles v. Bates*, 672.

37. Another statute gave to stockholder paying such debts action for contribution against stockholders "originally liable" with him. *Held*, all who were stockholders when debt was contracted, and also all who were stockholders when liability was enforced could be made to contribute. *Id.*

38. Trustees holding stock are liable to contribute from trust funds in their hands. Married women are also liable to contribute, the liability being statutory and incident to ownership of stock. *Id.*

COSTS.

1. Where board of aldermen have increased and are increasing city debt beyond statutory limit, the aldermen may be required personally to pay costs of action by citizens to enjoin further increase. *Scott v. Alexander*, 209.

2. In suits where one person incurs expense in rescuing property for benefit of many, court of equity has power to direct that expenses so incurred shall be paid from common fund. *Merwin v. Richardson*, 74.

COUNTY. See MUNICIPAL CORPORATION.

COURTS. See CONTEMPT. COPYRIGHT, 1, 2. TRIAL.

Although a statute authorizing grant of letters of administration to creditors upon failure of relatives to apply in specified time, contains no provision for notice to relatives, Orphans' Court may, by rule, require previous notice to them. *Gans v. Dabergott*, 187, and note.

COVENANT.

1. Action at law cannot be maintained after assignee has severed his relation to land, in respect to breaches of covenant committed during his holding. Remedy in such case is in equity. *Donelson v. Polk*, 474.

2. Covenant in deed for land containing a quarry, that grantor will not open or work, or allow to be opened or worked, any quarry on certain farm owned by grantor adjoining land conveyed, cannot be enforced against assigns of grantor. *Norcross v. James*, 64.

3. Where A.'s land was bound by a covenant to keep open a private road for the use of the owner of an adjoining tract, and A. encroached on said road by erecting piazzas, &c. Held, that the owner of the dominant tenement was entitled to an injunction and was not estopped by reason of having offered no resistance to erection of said obstructions, of which he had knowledge; and that statute of limitations was no defence. *Gawton v. Leland*, 141.

4. Agreement as to party wall provided that A. should build it, and that before B. should use it, he should pay A. one-half of its cost, and that the provisions of the agreement should run with the land. Held, that the agreement to pay one-half the cost was personal to A., and that wall when completed, became the property of each, although A. had right to retain possession of whole as security for payment of sum due him. *Gibson v. Holden*, 610.

CREDITORS' BILL. See EQUITY, 11. RECEIVER. REMOVAL OF CAUSES, 3.

CRIMINAL LAW. See ACTION, 5. ATTORNEY. BILLS AND NOTES, 11, 12. CONSTITUTIONAL LAW, 22, 42, 43. ERRORS AND APPEALS, 2, 10. EXTRADITION. HABEAS CORPUS. SALE, 13, 14. SLANDER AND LIBEL, 4. SUNDAY.

I. Generally.

1. On appeal erroneous ruling will not be reversed if accused was not injured by it. *Swann v. State*, 474.

2. That A. employs B. in a legal business during the week does not of itself make A. liable for B.'s illegal acts on Sunday. *State v. Burk*, 673.

3. In criminal as well as civil cases, the rule is that insanity should be established by a preponderance of testimony, and not to the exclusion of all reasonable doubt. *Danforth v. State*, 141.

4. To be fugitive from justice within Act of Congress regulating extradition it is not necessary that party charged should have left the state after indictment found, or to avoid prosecution. *Roberts v. Reilly*, 209.

5. The reasonable doubt the jury is permitted to entertain in criminal cases must be as to the guilt of the accused on the whole evidence and not as to any particular fact in the case. *Davis v. The People*, 142.

6. Statute making it misdemeanor to "commit an act injurious to the public health or public morals, or the perversion or obstruction of public justice, or the due administration of the law," is unconstitutional and void for uncertainty. *Ex parte Jackson*, 209.

7. Before acts and declarations of felon can be put in evidence against alleged accomplice, conspiracy must be proved to satisfaction of trial judge. *Rowland v. State*, 209.

8. Acts and declarations of one accomplice, in absence of another, after deed done and criminal enterprise ended, are not admissible in evidence against latter. *Id.*

9. An act providing increased penalties for second and subsequent offences of burglary, grand larceny, robbery, forgery or counterfeiting, is not unconstitutional either as visiting penalties disproportioned to the offences, or as placing the defendant in jeopardy a second time for same offence. *Kelly v. People*, 397, and note.

10. Where such act provides that whenever any person convicted of either said crimes shall thereafter be convicted of any one of such crimes, he shall be liable to such increased penalty, the second offence need not be identical crime for which he was first convicted. *Id.*

11. The fact that constitution of state has been disregarded in course of judicial proceedings will not render judgment in which such proceedings termi-

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nate void, if error was not on jurisdictional point; nor can such judgment be collaterally impeached. *Kelly v. People*, 397, and note.

12. Conceding that trial by court of a criminal case, defendant having waived a jury, is erroneous, yet such error not being jurisdictional will not make conviction void; and such conviction of one of offences enumerated in above cited act will render a subsequent conviction of any of those offences a second conviction within the meaning of the act. *Id.*

13. Plea of guilty by principal offender, received and recorded, though sentence is not pronounced, is in all essential respects equivalent to a verdict of guilty returned and entered on the minutes, and is such a conviction of principal as authorizes court to proceed with trial of an accessory. *Groves v. State*, 543.

14. It is true, that before sentence, plea can be withdrawn and that verdict can only be arrested or set aside for cause shown, whether a judgment has been rendered on it or not. Still, so far as resorted to for showing guilt of principal *prima facie* in order to bring on trial of accessory, they stand on same footing. *Id.*

15. The constitutional provision that every person charged with an offence shall have privilege of counsel, would amount to nothing if counsel for accused were not allowed sufficient time to prepare his defence. *Blackman v. State*, 543.

16. Where crime charged was murder, committed early in September, and court met on fourth Monday same month, bill of indictment was found on Tuesday, and on Wednesday court assigned accused counsel and announced it would take up case on Friday following, and counsel asked for continuance, as they had not had time to confer with prisoner and prepare his defence, he having been brought from jail of another county late on Thursday evening before, the continuance should have been granted. *Id.*

17. There is no such inflexible rule of law as that no person can be convicted on testimony of accomplice unless corroborated by other evidence. It is for jury to pass on credibility of accomplice as on that of every other witness. Statements of accomplice should be received with caution, and court should so advise jury, but if testimony carries conviction, and jury are satisfied of its truth, they should give it same effect as that of witness not implicated in offence. *Bacon v. State*, 543.

18. It is not error to charge that if witness sworn in case is an accomplice, his testimony without more, cannot convict, but if jury believe from evidence, that witness was not an accomplice, then his evidence alone may convict; and this would be true though he was charged in indictment with the crime, and his own testimony alone showed he was not an accomplice, and though he was present, if that presence was constrained, or he was enticed there by false claim of defendant and another to the property and an anticipated lawsuit about it. *Bernhard v. State*, 543.

II. Intoxicating Liquors.

19. Licensed dealer in spirituous liquors cannot escape penalty for unlawfully selling to minor by proving that sale was made by his barkeeper, during his absence, without his knowledge, and contrary to his instructions given in good faith, and which were so understood by barkeeper. *Carroll v. State*, 74.

20. Under statute imposing fine for sale of liquor to minor, no conviction can be had if accused made sale after exercise of proper caution and in honest belief that purchaser was of lawful age. *Kreamer v. State*, 517, and note.

21. An indictment charging single sale to one person only, for one price, of a number of commodities, the unlawful sale of either one of which would, under the statute, constitute a public offence, is not bad for duplicity. *Id.*

III. Larceny.

22. It is error to instruct jury that the possession of stolen property soon after theft is sufficient to convict, unless satisfactorily explained, and that an *alibi* must be clearly and satisfactorily proved; if they have a reasonable doubt of prisoner's guilt, they should acquit: *Hoge v. People*, 738.

23. Defendant was indicted for larceny of gold watch. On trial, an expert testified that the property stolen was not a gold watch, though known to the

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people as such, but was called by the trade a filled case. All the witnesses spoke of it as a gold watch, and it had every appearance of being such. *Held*, that there was no variance between the allegation in the indictment and the proof. *Glover v. State*, 673.

IV. *Murder*. See *supra*, 16.

24. Where there is no doubt that prisoner began encounter resulting in death, previous threats of deceased are not admissible, there being no evidence of intention at time of killing to execute the threats. *Bond v. State*, 345.

25. Nor is evidence of reputation of deceased as violent, quarrelsome and dangerous man admissible when prisoner is assailant, without reasonable ground to believe himself in danger of serious bodily harm. *Id.*

26. On trial for murder, evidence of what occurred at saloon half a square from where homicide took place, four or five minutes before the killing, is admissible, to show general conduct of prisoner immediately preceding the killing, that he was armed and in frame of mind likely to result in mischief. *Kernan v. State*, 792.

27. What was said and done by others at same time and in company with prisoner, was only a part of what he was directly connected with and necessary to an intelligent appreciation of his actions. *Id.*

V. *Wife Beating*.

28. Where several witnesses testified to distinct beatings given the wife by the husband, at no great intervals apart, but all within two years before the indictment was found, no two of the witnesses testifying to the same cruel treatment, it was error for the court to compel the state to elect one of these transactions on which it would rely, and when the election was made, rule out all the evidence in relation to the others. *Member v. The State*, 141.

CUSTOM. See AGENT, 7. CONTRACT, 20. INSURANCE, 12, 25.

DAMAGES. See ATTACHMENT, 14. COMMON CARRIER, 13. CONSTITUTIONAL LAW, 9, 48. CONTRACT, 8, 19. HIGHWAYS, &c., 2. INJUNCTION, 2. OFFICER, 2. PATENT, 2. RAILROAD, 8. SPECIFIC PERFORMANCE. TRESPASS. UNITED STATES COURTS, 3, 4. WATERS AND WATER-COURSES, 3-5.

1. When a bond in usual form for \$500, was conditioned that the obligor should never open and keep a barber shop within a certain town, the sum named held to be a penalty and not liquidated damages. *Burrill v. Duggett*, 142.

2. Expenses of litigation do not fall under head of punitive damages, but stand by themselves, and may be recovered whenever defendant has caused plaintiff unnecessary trouble and expense. *Moseby v. Sanders*, 544.

3. Where cause of action is negligence of municipal corporation in improvement of street, injury is complete, and all damages, present and prospective, may be recovered; a second action will not lie for fresh damages resulting from said improvement. *City v. Voegler*, 101, and note.

4. *Semble*: A temporary wrong might be done under such circumstances as would make it reasonable to presume defendant would right the wrong before recurrence of loss, and in such cases a second action might lie for fresh damage. *Id.*

5. If lack of care and skill in devising plan of improvement is so great as to constitute negligence, municipality is liable for errors of judgment. *Id.*

6. Punitive not recoverable where conductor, in obedience to rules ordered purchaser of first class ticket to occupy car not so comfortable as one from which he was removed, but used no force or insult in removing him. *Holmes v. Railroad Co.*, 474.

7. Where plaintiff is aware of certain rules of railroad company, and takes passage to violate these rules and bring suit, his declarations to this effect are admissible in mitigation of damages. *Id.*

8. In action of lessee of mill, against lessor, for diversion of water, depriving plaintiff of demised water-power, evidence of profits made is admissible on question of damages, loss of profits being a consequence parties could reasonably have anticipated. *Crawford v. Parsons*, 406.

DAMAGES.

9. In determining value of lands taken for public purposes, their market value is the thing to consider. Compensation to owner is to be estimated by uses for which the lands are suitable, having regard to existing wants of community, or such as may be reasonably expected in immediate future. *Low v. Railroad*, 474.

10. Measure of, for breach of contract of sale of personal property, is difference between market price at place of delivery, and contract price. *Equitable Co. v. Balt. Co.*, 739.

11. If there is no regular market price at place of delivery, and goods are costly and difficult of transportation from a distance, and are to be used for manufacturing purposes, then market price may be arrived at, by deducting cost of manufacturing and price of raw material, from market price of manufactured article. *Id.*

DEATH. See CONTRACT, 10.

DEBTOR AND CREDITOR. See EQUITY, 11, 12. EVIDENCE, 21. FRAUD,

1. GUARANTY, 1. MORTGAGE, 16. SALE, 11, 12.

1. Retention of personal property by vendor after sale, is *prima facie* evidence of fraud, explainable by showing that the retention is inconsistent with the deed, or unavoidable or temporary, or for reasonable convenience of vendee. *Holliday v. McKinne*, 345.

2. Creditors of intestate can question his fraudulent transactions by proper proceedings in the courts. *Id.*

3. Better rule is not to permit representative of estate to question such transactions for benefit of creditors. *Id.*

4. Vendee who takes possession subsequent to sale, but before rights of creditors have accrued by attachment or otherwise, can hold property against creditors. *Gilbert v. Decker*, 739.

5. Presumption of fraud from retention of possession, is only raised in favor of attaching creditors or those who stand in their position, and does not exist in case of sale of property exempt from execution. *Id.*

6. It was shown that A. owed B. a debt which he had given a mortgage to secure; that B. purchased other notes of his without his knowledge: and that he had sent B. cotton to be credited on his indebtedness. *Held*, that A. manifestly intended to pay the mortgage debt, and that payment should have been so applied. *Holley v. Hardeman*, 544.

7. When one purchases goods, being insolvent and not intending to pay for them, and conceals his insolvency and his intention not to pay, he is guilty of a fraud, which entitles the vendor if no innocent third party has acquired an interest in them, to disaffirm the contract and recover the goods. *Johnson v. O'Donnell*, 142.

8. Where a bill in equity showed goods so purchased to have been fraudulently transferred to other parties also made defendants, it was held that the subject-matter being the goods, in order to avoid a multiplicity of suits, courts of equity would have jurisdiction, there being no objection of multifariousness or misjoinder of defendants. *Id.*

9. A debtor for the purpose of defeating his creditors, conveyed his property to his son with understanding that it should be reconveyed to him when requested, and if reconveyance was not demanded then that son should provide for him during his life, and have property at his death. *Held*, that the conveyance was merely colorable, that a secret trust existed for the grantor, and therefore, the sale was void both as to precedent and subsequent creditors. *Gordon v. Reynolds*, 142.

10. A. being indebted, conveyed his land, and afterwards judgments were obtained against him on this antecedent indebtedness. B., with notice of conveyances, advanced a sum sufficient to pay off these judgments, which were then assigned to him, and as further security, A. gave B. bond with higher rate of interest, and mortgage of land embraced in said conveyances. In action by B. against A. and his grantees to foreclose mortgage, *Held*, that the conveyances were not a fraud upon any rights which B. was seeking to enforce; and, therefore, whether A. owed any other debts at the time he made conveyances was irrelevant in this action. *Currihan v. Byrd*, 209.

DECEDENTS' ESTATES. See **CONFLICT OF LAWS**, 5. **DEBTOR AND CREDITOR**, 3. **ERRORS AND APPEALS**, 7. **INFANT**, 1.

1. Debt due by decedent as surety on county treasurers' bond, is a "debt due to the public," and as such entitled to priority. *Baxter v. Baxter*, 210.

2. Executors' verbal statements to creditor of estate, that his claim was all right, and that they would pay it as soon as they had money enough, will not excuse creditor's neglect to present claim to them formally within time limited by order of court; nor will allegation that they have wasted the estate, unsupported by statement of facts, render them personally liable to creditors of estate. *Lewis v. Champion*, 209.

3. In a proceeding by an administrator for leave to sell land to pay debts the court, exercising a mere statutory authority, has no jurisdiction to determine conflicting titles to the land. It may determine all questions relating to the sale, but in respect to land can only find that decedent had a claim to same, and purchaser will take subject to adverse claims of title and must establish his right to possession by action in court of law where legal titles are cognisable. *Harding v. Le Moyne*, 148.

4. If in such proceeding paramount owner of land is made defendant, he should assert his rights to prevent an estoppel *in pais*, even though an issue to determine same could not be entertained. *Id.*

DECRIT.

1. Plaintiff alleged in complaint that as sub-contractor in construction of building for defendant he had inchoate lien for his claim and was about to perfect it, when defendant, to prevent his doing so, falsely represented to him that she had paid original contractor in full, and that plaintiff, believing the representation, did not perfect his lien; claiming damages for false representation. *Held*, on demurrer to complaint that it presented good cause of action. *Alexander v. Church*, 739.

2. And held not to affect case, that it did not appear that original contractor was irresponsible, nor that demand had been made on him. *Id.*

DEED. See **AMENDMENT**, 4. **EQUITY**, 4. **EVIDENCE**, 3. **FRAUD**, 1. **HUSBAND AND WIFE**, 13. **MORTGAGE**, 23.

1. Maker may prove there was no acknowledgment of deed, but if acknowledged, officer's certificate is conclusive of terms. *Petty v. Grisard*, 210.

2. There cannot be a delivery of a deed to the grantee *in escrow*. Such delivery makes the deed an absolute one to the grantee. *Stevenson v. Cropwell*, 143.

3. Conveyance of land after delivery is binding on grantors without any acknowledgment. The purpose of acknowledgment is to prove execution of deed, and when this is otherwise proved, it is as binding as if properly acknowledged. *Robinson v. Robinson*, 673.

4. A "reservation" is something newly created or reserved out of the thing granted; an exception is part of the thing granted. *Elliott v. Small*, 714, and *note*.

5. Warranty deed conveyed parallelogram of land "containing five acres," but "reserving from said grant a strip, thirty-three feet wide on the south side of said tract, for a public street." *Held*, that fee to strip thirty-three feet wide was in grantee; and that if it was either an exception or reservation, it was the latter. *Id.*

6. A deed conveying to the grantee his heirs and assigns forever, the right of having and repairing a dam on certain premises, with the right to so much of premises as may be necessary on which to build and maintain the dam, conveys a fee in the land upon which the dam stands. *Inhabitants Searsmont v. Plimpton*, 143.

7. Assignee for benefit of creditors is not *bona fide* purchaser for value so as to make assignor's deed to him have precedence over deed of real estate from assignor to purchaser for valuable consideration, which was delivered before, but not recorded until after assignment deed; even though the creditors have executed a general release of all claims against debtor, in consideration of assignment. *Tyler v. Abergh*, 739.

8. Whether if release had been executed on faith of debtor's ownership of

DEED.

real estate in question, this would have constituted assignee or creditors *bona fide* purchasers within the meaning of Maryland code, *Quare? Tyler v. Abergh*, 739.

9. One who has accepted specific property in payment of specific debt, is within the act. *Id.*

10. General deed of premises lying upon bank of river, in which is constructed a canal, conveys grantor's rights to centre of stream. *Day v. P. Y. & C. Rd.*, 740.

11. Where the canal company had right only to use for canal purposes, bed and waters of such river, on ouster of such company from its corporate franchises, and its dissolution by order of court, the trustees winding up its affairs have no power to convey such rights, but they revert to the proper owners. *Id.*

DELIVERY. See **CONTRACT**, 18. **GIFT**, 3, 4.

DEMURRER. See **CONSTITUTIONAL LAW**, 41. **EQUITY**, 2. **FRAUDS**, **STATUTE OF**, 8. **LIMITATIONS**, **STATUTE OF**, 3. **MANDAMUS**, 4. **NEGLECT**, 17.

DESCENT. See **CONFLICT OF LAWS**, 5, 9.

DEVISE. See **WILL**, 3, 6, 8.

DIVIDENDS. See **ATTACHMENT**, 5. **CORPORATION**, 33.

DIVORCE. See **HUSBAND AND WIFE**, I.

DOMICILE. See **CONFLICT OF LAWS**, 5, 6. **EXECUTORS AND ADMINISTRATORS**, 1. **UNITED STATES COURTS**, 1.

When a home of a person is once established in a town, it requires less proof to show continuance there, than would be necessary to show both establishment and continuance. Bodily presence at all times is not necessary to show continuance. The departure of a minor daughter from home for temporary employment, leaving behind articles not required for immediate use, even though she receives the wages of her labor for her own use, is not sufficient to raise presumption of emancipation, and these facts together with expression of an intention to return and actual returning to visit, to repair wardrobe, and on account of sickness, are sufficient evidence of continuance of domicile. *Inhabitants Searmont v. Inhabitants Thorndike*, 143.

DONATIO CAUSA MORTIS. See **CONFLICT OF LAWS**, 1. **GIFT**, 1, 2, 3.

DOWER.

When widow is entitled to dower in land which has been divided by partition between several persons, she may bring a separate suit against the owner of each portion. Perhaps she may proceed against all in one suit, but she is not compelled to do so. *Coburn v. Harrington*, 144.

EASEMENT. See **CONTRACT**, 11. **DEED**, 6. **EJECTMENT**. **HIGHWAYS**, 1. **LICENSE**, 2, 3. **WATERS AND WATER-COURSES**, 6-9.

EJECTMENT. See **HUSBAND AND WIFE**, 14. **MORTGAGE**, 22. **REMOVAL OF CAUSES**, 8.

Certain persons were permitted to build a public hall as a second story of new school house, and an agent authorized by the district leased that second story to the builders of it, with necessary easements of ingress and egress, and with equitable provisions as to use and repair of the building, &c., "so long as the building shall stand." The building was occupied in accordance with the agreement, for nearly thirty years, when the district voted "to sell the school house and lot under" the hall, and by deed their agent conveyed all their interest in the lot and building thereon. In a real action by the grantee against the occupants of the hall, the court, after discussing the nature of the titles, *held*, that defendants, having disclaimed all but the hall with its easements, and being in possession of that, have a color of title, and plaintiff had failed to show a better one. *Peaks v. Belthen*, 144.

ELECTION. See **WILL**, 12.

ELECTIONS. See **CONSTITUTIONAL LAW**, 2, 16.

EMINENT DOMAIN. See CONSTITUTIONAL LAW, III. DAMAGES, 9.

EQUITY. See ACTION, 1, 2. AGENT, 12. AMENDMENT, 1-6. ARBITRATION, 1, 2. ASSIGNMENT, 1-6. CORPORATION, 1, 6, 33. COVENANT, 1. COSTS, 2. DEBTOR AND CREDITOR, 9. ERRORS AND APPEALS, 1. EXECUTORS AND ADMINISTRATORS, 2. GIFT, 4. INJUNCTION, 3, 6. INSURANCE, 18, 24. LICENSE, 2, 3. LIEN, 1, 2. LIMITATIONS, STATUTE OF, 10. LIS PENDENS. MORTGAGE, 9, 10, 24. MUNICIPAL CORPORATION, 11-13. PARTITION, 2. PARTNERSHIP, 10, 11. PUBLIC POLICY, 3. RECEIVER, 7. TAX AND TAXATION, 6. TRADE-MARK, 3. USURY, 7.

1. Answer upon oath to bill in equity that does not call for answer upon oath, does not operate as evidence of facts stated therein. *Clay v. Toule*, 544.

2. Lord Bacon's ordinance, declaring that all suits under the value of 10*l*. shall be dismissed, is in force in New Jersey; and defendant may make the objection, either by demurrer or by motion on notice. *Allen v. Demarest*, 611.

3. Oral agreement by directors to indemnify one of their number who endorses promissory note for benefit of the corporation, is not within Statute of Frauds and remedy thereon at law is adequate. *Cortelyou v. Hoagland*, 210.

4. Stipulation in deed of lot in grounds of Camp Meeting Association, prohibiting erection or use of buildings for stores, boarding-houses, hotels, or stables thereon, without consent of association, is enforceable by injunction. *Winapesauckee v. Gordon*, 475.

5. Equity to have the securities embraced in trust for benefit of creditors of different classes, marshalled and appropriated in exoneration of liens of less preferred class, is an equity against the debtor, and not against the doubly secured creditor. *Pope v. Harris*, 346.

6. Right of debtor to homestead is superior to that of all creditors except so far as it may be impaired by voluntary act of claimant. *Id.*

7. Debtor understandingly and deliberately conveying property to hinder or defraud creditors cannot recover it. *Nichols v. McCarthy*, 740.

8. But whether party guilty of independent fraud in receiving or retaining property upon such conveyance should be allowed to avail himself of fact that conveyance to him was made to defraud creditors, as defence against suit to recover property back, *quere*; court inclined to opinion that such qualification of rule would be reasonable. *Id.*

9. Where court of equity attempts to act directly upon property, whether real or personal, it is, in absence of statutory regulation, essential that said property be within territorial jurisdiction of court. *Johnson v. Gibson*, 673.

10. But where one claims property situate in foreign jurisdiction, which in good conscience belongs to another, the latter may sue him in equity wherever he may be found and compel a conveyance. In such case decree operates on person of defendant. *Id.*

11. Creditor may maintain bill to set aside fraudulent conveyance of his debtor wherever debtor and fraudulent vendee may be found. In such case court does not act upon land itself, but simply declares conveyance void, and removes same as an obstruction to creditor's legal remedy. *Id.*

12. Where debtor conveys all his property in distinct parcels to separate parties and dies, creditors' bill to set aside said conveyances for fraud may include all the grantees. In determining whether bill is multifarious much is left to discretion of court. *Brian v. Thomas*, 74.

13. Where several respondents, acting independently, deposited refuse material, &c., arising from operation of their mills into same stream, where it commingled into one indistinguishable mass before reaching complainant's premises; *held*, that all the respondents may be joined in same bill to restrain the nuisance. *Lockwood Co. v. Lawrence*, 75.

14. A receiver filed a bill in his own name to foreclose a mortgage made to A. in trust for B. It not appearing by the recitals of the bill that the decree appointing the receiver transferred to him the legal title which A., as trustee, had in the mortgage: *Held*, that A. was a necessary party to the bill. *Tyson v. Applegate*, 144.

15. Further recitals in the bill justified the conclusion that the decree divested B. of her interest in the mortgage, and vested that interest in three persons

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named in the bill: *Held*, that these three were necessary parties to the bill, but that B. was not. *Tyson v. Applegate*, 144.

16. The rule that *cestui que trustent*, as well as trustees, should be made parties to bill to foreclose mortgage is to be observed where the former are known and not so numerous as to render such practice highly inconvenient. *Id.*

17. It is not essential to enforcement of contract for sale of lands that it should be signed by complainant as well as by defendant. *Carakudden v. Kennedy*, 145.

18. A contract induced by fraudulent representations would not be enforced in equity, even though parties did not intend to make representations part of contract. *Id.*

19. If tender of purchase-money is refused by party on ground that he is not bound to convey, the propriety of tender cannot afterwards be objected to because there was a misdescription of land in deed which he was requested to execute at time of tender. *Id.*

20. Oral evidence is not competent to establish agreement to change description of land previously bargained for by a written contract signed by vendor. *Id.*

21. Where release to railroad company for injuries received is brought about by fraud, or where there has been no *aggregatio mentium*, or where unconscionable advantage has been gained by mere mistake or misapprehension, and where there is no gross negligence on part of plaintiff, equity will interfere, in its discretion, to prevent intolerable injustice. *Blair v. C. A. Rd.*, 611.

22. Chancery will not reform promissory note payable in *future*, with ten per cent. interest from date, by adding words "until paid," though parties intended it to bear that interest after as well as before maturity, if they omitted the words only because they thought them unnecessary. A contract written as parties intended it to be written, cannot be reformed for their mistake of its legal effect. *Rector v. Collins*, 544.

23. Assignee of void security, issued in lieu of valid one, is, in equity, subrogated to all rights of his assignor (the holder), in original security, and is entitled to have it delivered up to him, and if imperfect, to have it reformed by party that executed it, or his successor in office. *Goldsmith v. Stewart*, 210.

ERRORS AND APPEALS. See CRIMINAL LAW, 1, 7, 18. INFANT, 2, 3. PROHIBITION.

1. No appeal lies from an order of court of equity dismissing petition for rehearing. *Zimmer v. Miller*, 347.

2. Supreme Court of United States has jurisdiction to review judgment of state court, denying that defendant is entitled to immunity from second trial for same offence, by reason of Art. V. of Amendments Constitution United States. *Bohanan v. Womaka*, 544.

3. Upon motion to dismiss, this court cannot consider merits of question on which its jurisdiction depends, unless there is also a motion to affirm. *Id.*

4. Supreme Court of United States cannot review weight of evidence, and can look into it only to see whether there was error in not directing verdict for plaintiff on question of variance, or because there was no evidence to sustain the verdict. *Lancaster v. Collins*, 75.

5. Decision as to which party shall make closing argument is not reviewable. *Id.*

6. Motion filed April 26th 1886, to reinstate case docketed August 11th 1883, submitted January 7th 1886, and dismissed for want of jurisdiction January 19th 1886, was denied, because court was not willing, at so late a day, to receive and consider affidavits to supply defect in record. *Johnson v. Wilkins*, 475.

7. Where suit is brought against heirs to enforce their liability for payment of note on which ancestor was bound, and they plead neither counter-claim nor set-off, and ask no affirmative relief, and separate judgments are rendered against each for his proportionate share, the Supreme Court of United States has jurisdiction in error only over those judgments which exceed \$5000. *Henderson v. Wadsworth*, 75.

8. Defendant in execution delivered to sheriff sufficient money to satisfy it on

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his agreeing to return it if supersedeas was obtained by certain day, but, if not, to apply it to satisfy execution. No supersedeas having been obtained within time stated, sheriff paid over money in satisfaction of execution. *Held*, that defendant did not waive his right to prosecute writ of error to judgment on which execution was issued. *Burrows v. Michler*, 674.

9. In suit to collect interest due on certain bonds of a railroad by foreclosure of mortgage made to secure series of bonds aggregating \$500,000, the bill was dismissed. Suit was brought by two complainants for themselves, and all others in like situation who might join, but no one did so. The principal of complainants' bonds exceeded \$5000, but the interest, which suit was brought to recover, was less. *Held*, that matter in dispute was less than jurisdictional limit of Supreme Court United States. *Bruce v. Railroad*, 406.

10. Writs of error were brought to Supreme Court of Utah, to review judgments affirming judgments of District Court of Utah, rendered on convictions on indictments under sect. 3 of Act of Congress of March 22, 1882, for cohabiting with more than one woman. Jurisdiction of Supreme Court of United States was endeavored to be sustained under sect. 2 of Act of March 3, 1885, giving jurisdiction, on appeal or writ of error in any case "in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States." *Held*, that all that was drawn in question was whether or not there was error in administration of the statute, and the writs were dismissed. *Snow v. United States*, 475.

ESTOPPEL. See **BILLS AND NOTES**, 5, 17. **INSURANCE**, 31. **MORTGAGE**, 27. **MUNICIPAL CORPORATION**, 22. **PARTITION**, 1. **REMOVAL OF CAUSES**, 4.

EVIDENCE. See **ATTORNEY**. **BANK**, 20, 22. **BILLS AND NOTES**, 1, 8, 14, 19. **COMMON CARRIER**, 8. **CONTRACT**, 21, 23. **CONSTITUTIONAL LAW**, 24, 41, 48. **CRIMINAL LAW**, 7, 8, 17, 18, 24-27. **DAMAGES**, 7, 8. **ERRORS AND APPEALS**, 4. **EQUITY**, 1, 20. **FORMER RECOVERY**. **HUSBAND AND WIFE**, 5, 6. **INSURANCE**, 8, 25, 33. **LIMITATIONS, STATUTE OF**, 1, 2. **LUNATIC**, 3, 4. **MASTER AND SERVANT**, 14, 15. **MORTGAGE**, 13. **NEGLECT**, 5, 13. **NOTICE**. **PARTNERSHIP**, 4. **PLEADING**, 3. **RAILROAD**, 10-12. **TELEGRAPH**, 2. **TRIAL**. **TRUST AND TRUSTEE**, 8, 10-12. **USURY**, 9. **WILL**, 1, 16-21, 27, 28. **WITNESS**.

1. Rule that communications between doctor and patient are confidential and inadmissible may be waived by patient. *Blair v. C. & A. Rd.*, 611.

2. Where records have been burned or destroyed, the entries in court minute books are admissible to establish regularity of proceedings. *Hare v. Holloman*, 346.

3. Where land has been sold under decree of court, and records have been destroyed, the recitals in the deeds are evidence of regularity of proceedings. *Id.*

4. Where question is as to authority given by telegram, party sending it should not, when sued, be permitted to testify what his intention was in sending it. *Meirhardt v. Mode*, 346.

5. Where telegrams do not contain entire contract, other parts may be proved by verbal testimony, or by other writings, or by both. *Id.*

6. Privilege of witness not to criminate himself is personal, and he must claim it under oath: neither party nor counsel can make the objection. *Club v. State*, 75.

7. Mere statement of witness on oath that he believes answer to question will tend to criminate him, will not suffice, if court be satisfied that answer will have no such effect. *Id.*

8. After witness has been sworn, protection may be claimed at any stage of inquiry. *Id.*

9. Witness to refresh his recollection may refer to memoranda made by himself or others, either originals or copies; such memoranda are not evidence to go to jury. *Erie Co. v. Miller*, 75.

10. In civil cases verdict of jury should be determined by mere preponderance of evidence, even though conclusion imputes to defendant guilt of felony. *Mead v. Husted*, 76.

11. Evidence of declaration of son of one of parties made in hearing of his

EVIDENCE.

father, who remained silent, was admitted against objection and jury instructed that it was for them to determine what significance they would attach to it. *Held*, no error. *Johnson v. Day*, 674.

12. Where a hypothetical case, covering the leading facts testified to, and practically admitted, is stated to a witness shown to be an expert, his opinion based on such hypothetical case, is proper evidence. *Lotz v. Scott*, 281.

13. The contents of a public record may be proved by the production of the record itself, or by a copy duly certified by proper officer or by an examined copy sworn to by an unofficial witness who made the examination. *State v. Lynde*, 145.

14. Instructions by grantor to attorney drawing deed are not ordinarily privileged communications. If grantor had instructed attorney to make conveyance to grantee in trust, it would be competent for attorney to so testify. *Todd v. Munson*, 741.

15. It is only where suit is upon cause of action, to which one party is dead, that other party is excluded, to preserve mutuality. *Horner v. Frazier*, 741.

16. Where such contract only incidentally arises in another suit, on another contract, and about something else, as matter of evidence, death of one party does not close mouth of other. *Id.*

17. Party disappointed in his witness may, to refresh witness' recollection, ask him if he has made contradictory statements, but cannot prove such statements by other witnesses, unless the witness is one whom law obliges party to call. *Hildreth v. Aldrich*, 346.

18. Where it is shown that evidence of indebtedness of party to decedent's estate, has been suppressed or destroyed by debtor, or some one acting in his interest, such indebtedness may be established by testimony, which would ordinarily be regarded as too indefinite. *Love v. Dilley*, 346.

19. Averments under oath in a pleading in an action at law, are competent evidence in another suit against the party making them; and the fact that they are made on information and belief goes only to their weight and not to their admissibility. *Pope v. Allis*, 145.

20. In action to recover for injuries received by one driving on highway, whose horse ran and bits attached to harness broke, and it became important to determine what effect breaking of bits had on accident. *Held*, (1) that testimony of witness was not admissible to prove that bits in a horse's mouth could be broken by pulling on reins; (2) that witness had had bits broken in way similar to that the plaintiff claimed his were broken. *Carpenter v. Town of Corinth*, 674.

21. A receipt is only *prima facie* evidence of what it imports, and may be explained or contradicted by party signing; but a settlement and receipt in full of an unliquidated demand, when made with full knowledge of all circumstances, is bar to subsequent action on the demand, although creditor accepts amount paid under protest and threats of suit for balance claimed to be due. *Railroad v. Allen*, 544.

22. Montana Statute provided: "All acts of the legislature declaring that they should take effect from and after their passage, shall so take effect only at the seat of government, and in other portions of the territory allowing fifteen miles from the seat of government for each day." *Held*, where, by reason of this statute, the question whether a certain law was in effect at a certain time in a certain part of said territory, depended upon distance of that place from seat of government, the distance was a fact of which the court was bound to take judicial notice. *Hoyt v. Russell*, 406.

23. Where in suit brought by representatives of decedent, the testimony of living defendant, concerning conversations had with decedent, is admitted without objection, the court cannot afterwards strike it out, because its admission is opposed to the statute. Testimony so admitted, can be struck out only when its exclusion is demanded by some consideration of public policy. *Rowland v. Rowland*, 145.

24. THE COMPETENCY, AS WITNESSES, OF HUSBAND AND WIFE, 353, 417.

EXCEPTION. See DEED, 4, 5.

EXECUTION. See CONSTITUTIONAL LAW, 1. **EXEMPTION.** HUSBAND AND WIFE, 11. **PARTNERSHIP**, 1, 2. **OFFICER**, 1, 2. **RAILROAD**, 7.

1. Court of county, to sheriff of which execution has been issued from another county, has no jurisdiction of motion to quash levy upon lands in its county, advertised for sale by the sheriff, proper forum being the county of the judgment. *Mellier v. Bartlett*, 611.

2. Statutes of Rhode Island provide, that execution may issue against body of defendant whenever it shall be made to appear to court, which rendered the judgment that "defendant has been guilty of fraud * * * in the concealment, detention or disposition of his property." *Held*, that such execution properly issues where one owns a patent right which he refuses to apply to payment of judgment against him, and that it may issue without notice to defendant. *Petition of Keene*, 674.

EXECUTORS AND ADMINISTRATORS. See COURT. **DEBTOR AND CREDITOR**, 3. **DECEDENT'S ESTATES**, 2-4. **GIFT**, 2. **INFANT**, 1, 13. **INSURANCE**, 8-10, 25. **JUDGMENT**, 2. **LEGACY**. **LIMITATIONS**, **STATUTE OF**, 9-12. **USURY**, 2. **WILL**, 4, 5.

1. Non-residence does not, of itself, disqualify for office of administrator. *Ehlen v. Ehlen*, 475.

2. Executor cannot file bill against his co-executor, to compel latter to pay to him, certain claims alleged to be due from defendant to estate of decedent. *Whiting v. Whiting*, 281.

3. Where money is bequeathed to one for life, with remainder to another, and executor has converted it to his own use, remainderman cannot sue on bond of executor, during lifetime of tenant for life. *State v. Brown*, 281.

4. In such case, remainderman's remedy is to file bill in a court of equity, or apply to Orphans' Court for order on executor to bring money into court to be safely invested. *Id.*

5. Upon neglect of executor to comply with such order, Orphans' Court will revoke his letters, and appoint administrator d. b. n. c. t. a., and direct him to bring suit on testamentary bond of recusant executor. *Id.*

6. Where testator devises his estate among his children, equally, each child's share to be charged with all advances made or to be made to him or her, administrators c. t. a. have right, as against judgment creditors of one of his children, to impound so much of his share as may be necessary to pay judgment recovered against such administrators on bond of such child on which testator was surety. *Stieff v. Collins*, 741.

7. Mississippi Code of 1871, sect. 2173, by which any action to recover property, because of invalidity of administrator's sale, by order of probate court, must be brought within one year, "if such sale shall have been made in good faith, and the purchase-money paid," does not apply to action by heir, to recover land bid off by creditor for payment of his debt. In this case, no bond was given as required by statute. *Clay v. Field*, 76.

8. Administrator d. b. n. is officially interested in his predecessor's bond, to extent of unadministered assets, and may originate suit thereon, provided his interest has been specifically ascertained; otherwise he must have authority from probate court to bring the action, and cannot rely on authorization given to another. In either case he must allege such facts in writ, as will authorize him to bring and maintain action. *Waterman v. Dockray*, 545.

EXEMPTION. See **DEBTOR AND CREDITOR**, 5. **HUSBAND AND WIFE**, 11. **RAILROAD**, 7. **SURETY**, 4. **TAX AND TAXATION**, 4.

1. Statute exempting debtor's necessary working tools, not exceeding in value \$200, covers only tools used in manual labor; does not cover lawyers' law books. *Petition of Church*, 346.

2. Debtor is entitled to have his personal property exemption ascertained up to sale. *State v. Harper*, 347.

3. Allotment of exemption may be corrected until execution is returned. *Id.*

4. If property of debtor has been omitted by appraisers, they can correct the allotment. *Id.*

5. That mortgage is unregistered will not subject to sale under execution, property which would be exempt if there were no mortgages. *Id.*

EXEMPTION.

6. Members of insolvent firm are not entitled to exemptions allowed by law out of partnership property after it has been seized to satisfy demands of firm creditors. *Richardson v. Adler*, 545.

7. Right to exemption as head of family must exist at time creditor's lien attaches. To become head of family after attachment is levied will not exempt property from sale under judgment of condemnation. *Id.*

8. One partner, with assent of other, is entitled to have personal property exemption out of partnership property before partnership debts are paid, although he has individual property sufficient to make up the exemption. *State v. Kenan*, 475.

9. A general waiver of exemption of wages from the process of garnishment extending indefinitely is void. *Green v. Watson*, 145.

10. Whether special waiver upon specific wages in certain employment and for a certain time by specific orders on employers containing such specific waiver is enforceable, not decided. *Id.*

EXPERT. See EVIDENCE, 12.

EXTRADITION. See CRIMINAL LAW, 4.

1. It is immaterial whether warrant of governor of one state for arrest of fugitive from another is based on original affidavit or copy thereof, when either one presented to resident governor is certified to other governor as authentic. *Kurtz v. State*, 345.

2. Fugitive from justice cannot on *habeas corpus* impeach validity of affidavit on which extradition was founded, if it distinctly charge commission of crime. *Id.*

FACTOR. See SET-OFF, 3.

FENCE. See CONSTITUTIONAL LAW, 9, 10. LIMITATIONS, STATUTE OF, 4. NEGLIGENCE, 1, 16. TAX AND TAXATION, 8.

FIXTURES. See LANDLORD AND TENANT, 1, 2.

1. Innocent purchaser of certain dwelling-houses, in which portable furnaces had been placed so as to become part of realty, is not affected by agreement between his grantor and vendor of furnaces, by terms of which latter was to retain property in furnaces until paid for. *Stove Co. v. Way*, 660, and note.

2. Portable furnaces placed in cellar of house on row of bricks, set in circle, with pipes fastened to ceiling of cellar and connecting with registers, are annexed to and become part of realty. *Id.*

FOREIGN ATTACHMENT. See ATTACHMENT, 15.

FORMER RECOVERY. See CONTRACT, 15. DAMAGES, 3, 4.

Judgment of Supreme Court of New York city in favor of plaintiff is bar to further prosecution of action in Maine between same parties, and for same cause, although prior in commencement; such judgment may be pleaded specially or proved under general issue. *Whiting v. Burger*, 612.

FRAUD. See ACTION, 2. AGENT, 12. ARBITRATION. ASSIGNMENT, 7. BANK, 16. BILLS AND NOTES, 13. CORPORATION, 2, 3, 30. DESTROYER AND CREDITOR, 1-3, 5, 7-9, 10. EQUITY, 7-8, 12. LIMITATIONS, STATUTE OF, 9-12. OFFICERS, 6. SALE, 1, 6, 10. VENDOR AND VENDEE, 1.

1. In order to justify annulment of deed as void under statute of 13 Eliz., ch. 5, because made with intent to delay, hinder or defraud creditors, a fraudulent intent must be proved. Manner of proof. *Zimmer v. Miller*, 347.

2. Where party effects exchange of real estate, situate in another state, with person residing in this state, for property here, by false representations as to quantity of his land, location thereof and improvements thereon, knowing them to be false, an action on the case for fraud and deceit may be maintained by party injured. Under these circumstances reliance on truth of statements is not such negligence as to preclude recovery for fraud practised; though had property been near enough to permit examination without inconvenience a different rule might prevail. *Ladd v. Pigott*, 407.

FRAUDS, STATUTE OF. See EQUITY, 3. LICENSE, 2, 3 TRUST AND TRUSTEE, 9-13.

1. Agreement by third party, to accept for creditor his debtor's draft for amount of debt, is same as promise to pay debt. *Chapline v. Atkinson*, 211.

2. Parol promise to pay another's debt is not within statute when it arises upon new and original consideration between newly contracting parties. *Id.*

3. Description of the land in agreement for its sale is sufficient, if it so describes a particular piece or tract that it can be identified, located or found. *Lernie v. Clark*, 741.

4. An express trust between the grantor and grantee of land that the grantee is to hold the land in trust for the grantor is invalid, unless evidenced by some writing signed by the grantee. *Stevenson v. Craped*, 141.

5. Where there is an express trust there cannot be an implied trust; and in case of a voluntary conveyance, no resulting trust can arise in favor of the grantor. *Id.*

6. Where the moving consideration for the promise to pay money is the liability of a third person, the promise must be in writing; but if there is a new consideration from promisee to promisor added, that makes it a new agreement which is not within the Statute of Frauds. *Power v. Rankin*, 146.

7. So where holder of chattel mortgage relinquished and permitted property on which it rested to be delivered by his debtor in consideration of promise of third party in whose hands \$1000 had been placed to pay it to him on delivery of property, it was held that the verbal promise to pay was not within the Statute of Frauds. *Id.*

8. It is not necessary in pleading to allege that promise was in writing. Such a plea, in addition to general issue plea, is an argumentative answer to declaration, asserting nothing not cognizable under general issue, and is therefore demurrable. *Horne v. Frazier*, 741.

9. Where, as part of consideration of sale and transfer of a lease for ten years of real estate, the assignee agreed "to assume the covenants and pay the rent agreed in said lease" such contract is not a promise to answer for default of another within Statute of Frauds. *Wolke v. Fleming*, 282.

GARNISHMENT. See ATTACHMENT.

GIFT. See DONATIO CAUSA MORTIS.

1. Bills, bonds and promissory notes, and all other evidences of debt, although payable to order and not endorsed, may be given as *donationes causa mortis*, and donee may sue on them in his own name. *Kiff v. Weaver*, 476.

2. Assent of personal representative is not essential to validity of *donatio causa mortis*. If needed to pay debts it may be recovered by representative, but *residuum* goes to donee. *Id.*

3. Before his last sickness, G. had expressed a desire that his children should have his notes (of which most of his property consisted) and his son should have his farm. On the morning of the day of his death, and in the presence of a daughter's husband, herself and sister, G. called the daughter and said to her "my notes are in a little box on the bureau there, I want you to take them and divide them equally among you children," he told her to get the key, which she got and tried in the box and gave to her husband for safe-keeping. *Held*, that these facts do not show such a delivery as constitutes a valid gift *causa mortis*. *Gano v. Fisk*, 76.

4. Father made assignment under seal (as gift, though expressed to be for value), of certain shares of stock, certificates for which at the time had been made out in name of assignor, but remained uncut in certificate book of corporation. The assignment, which contained no power of attorney authorizing transfer, was left by assignor with attorney of corporation, with whom also was left book of certificates, with instruction that, upon obtaining assent of mortgagee of corporation, transfer should be made to daughter on books of company. No transfer, however, was made in lifetime of father. *Held*, 1st. That assignment was incomplete and could not be enforced in equity. 2d. That there was no element of trust in the case. 3d. That if father had declared he held or would hold the shares in trust for daughter, perhaps equity would enforce such trust, though voluntary. *Baltimore Co. v. Mali*, 741.

GUARANTY.

1. Agreement by creditor to extend time of payment of debt guaranteed upon debtor paying him sum of money due on another transaction, is not based on good consideration and will not discharge guarantor. *Salary v. Stutz*, 545.

2. Appended to paper purporting to be bill for merchandise sold by A. to B., was following instrument: "In consideration of seven and a half per cent. I guarantee the above bill to the amount of two hundred dollars," signed by S., which had been written by A. and presented by him to S. for his signature at conclusion of negotiation between them, signed by S. and returned to A. *Held*, that this was a guarantee, and not an offer to guarantee, which would require acceptance by beneficiary and notice thereof to guarantor. *Id.*

GUARDIAN AND WARD. See INFANT, 1-4. SURETY, 1.

HABEAS CORPUS. See CONSTITUTIONAL LAW, 42.

1. A writ of *habeas corpus* is not removable from a state court into a Circuit Court of the United States, under Act March 3, 1875, c. 137, sect. 2. *Kurtz v. Moffitt*, 136.

2. Petition for, showed that petitioner was regularly brought before grand jury as witness, that he refused to answer certain questions, and that court thereupon fined him twenty-five dollars, and on refusal to pay same, ordered him to stand committed to county jail until fine and costs should be paid. *Held*, that if court erred in imposing fine, remedy was by appeal or writ of error, and not by writ sought. If order had been simply a committal until petitioner answered questions, different question would be presented. *Ex parte Smith*, 742.

HEIR. See ACTION, 1.

HIGHWAYS; STREETS. See CORPORATION, 4, 5. MUNICIPAL CORPORATION, 1, 2, 9, 10, 21. NEGLIGENCE, 18.

1. Owner of land in public way may lawfully plant shade trees within limits of way, if public use is not thereby obstructed or endangered. *Wellman v. Dickey*, 545.

2. Trees so planted are a public benefit and highway surveyors who destroy such trees without reason or necessity, are trespassers, and if act is wanton are liable for exemplary damages. *Id.*

3. Owner of city lots has no right to make subterranean passage from one to another through underlying soil of public street, the fee of which is not in him, in order to mine and remove minerals, even though no injury may result thereby to the street as such. *Zinc Co. v. City of La Salle*, 797.

4. Public easement in public street is public and common right to use same for passage of persons and property, and purposes incidental thereto. *Newell v. Railway Co.*, 431, and note.

5. Owner of soil of street has right to insist that street be used for legitimate purposes and in proper manner; but his power to question the authority for its legitimate use by particular corporation, is limited. *Id.*

6. When street is being used for legitimate purposes, but objection is made to mode of use, question is whether use objected is consistent with the common public use; and is a question of law, the facts being ascertained. *Id.*

7. Doctrines applied in case of use of street by railway company using steam as motor. *Id.*

8. Baltimore and Frederickstown Turnpike Road is entitled to charge and collect toll for ten miles from person passing through the ninth gate on its road westward from Baltimore city—toll for three miles east and seven west of gate—whether he actually starts from Frederick and stops at Middletown, which is only five miles west of gate, or not; and person going east must pay for same ten miles, and not simply for six miles between gates eight and nine. *Turnpike Road v. Rutzahn*, 798.

9. Bill for injunction filed by owners of large tract of land, stated that they had laid it out into building lots, and had opened and dedicated streets thereon (which, however, had never been accepted by public authorities), and had filed map thereof in county clerk's office; that complainants had sold some of the lots, and that present owners thereof had admitted easement in adjacent streets; and that complainants annually expended large sums of money for repairing all the

HIGHWAYS ; STREETS.

streets and keeping them in order. *Held*, that complainants could not enjoin hackmen from ordinarily using any of the streets, in carrying their passengers to and from railroad station. *Land Co. v. Cramer*, 215.

HOMESTEAD. See EQUITY, 6. MINES AND MINING, 4.

HUSBAND AND WIFE. See AGENT, 11. CORPORATION, 38. EVIDENCE, 24. LEADING ARTICLE, p. 692. INSURANCE, 23. PRESUMPTION, 1, 2. TRUST AND TRUSTEE, 9-11.

I. *Marriage, Divorce and Alimony.*

1. Where alimony has been granted, in instalments, to divorced wife, and she marries a man able to and who does support her, there is *prima facie* good ground to reduce the alimony. *Olney v. Watts*, 77.

2. Husband and wife separated by mutual consent shortly after marriage and lived apart for sixteen years, the husband allowing wife small sum for support, when he discovered she was living in adultery. *Held*, that husband was not entitled to divorce. *Hawkins v. Hawkins*, 97, and note.

3. A judgment ordered for defendant on an agreed statement of facts which showed that mortgage in suit was given to secure payment of sum of money by husband to his wife, under collusive agreement for obtaining divorce in her favor, is not conclusive against rights of wife, after such divorce has been decreed, to recover alimony from the husband. *Cross v. Cross*, 407.

4. Nor is adultery of the wife, both before and after such divorce, a legal bar to the granting of alimony upon her petition subsequently brought. *Id.*

5. Paper found in possession of or produced by one of parties to alleged marriage purporting to be marriage certificate, is admissible in civil cases other than actions for seduction, without proof of its genuineness, or that it was given by one acting in an official capacity. *Inhabitants of Camden v. Inhabitants of Belgrade*, 612.

6. In proof of disputed marriage in such actions, cohabitation, reputation, the declarations of the parties, written or oral, and their conduct and all other circumstances usually attending the marriage relation, are admissible; and where there is shown to have been cohabitation for some years and children, it is admissible to show what kind of family woman had previously belonged to and what kind of home she had left. *Id.*

7. Courts of other states have no authority to decree divorce between citizens of Maine, and its courts are not bound by findings of courts of other states upon jurisdictional question of residence of parties. *Gregory v. Gregory*, 612.

8. Adultery by libellant at any time before final decree constitutes perfect bar to divorce, and if after answer filed, defendant may recriminate by supplemental answer. *Fuller v. Fuller*, 612.

9. A. and P. were married in West Virginia, at their domicile, where A. retained his domicile, but P. went to Tennessee, where, in *ex parte* proceedings, she obtained a divorce *a vinculo* from A., but, as there was no personal service upon A., her application for alimony was dismissed without prejudice. She then brought suit in Ohio for alimony alone, and to reach certain property there belonging to A.; she obtained service upon A., who also appeared and filed pleadings, and on trial court found sufficient cause, and allowed her alimony. *Held*, that course of proceedings was lawful. *Woods v. Waddle*, 742.

II. *Separate Estate.* See *infra*, 16.

10. Husband is not liable for separate property of wife received by him with her knowledge and acquiescence, and without any express promise to repay her. *Machine Co. v. Rindcliff*, 77.

11. The statute prohibiting conveyances by the wife without joinder of her husband of such real estate as has been conveyed to her by her husband, does not exempt such real estate from attachment and levy by her creditors. *Vergil v. Stetson*, 146.

III. *Torts, Contracts, Conveyances, &c.*

12. Funeral expenses of wife are to be paid by husband. *Staple's Appeal*, 77.

13. Private examination of wife before proper officer is indispensable requisite to conveyance of her real estate. *Carr v. Haisley*, 347.

HUSBAND AND WIFE.

14. Plaintiff cannot avail himself of title acquired or which did not subsist in him until after he commenced suit. *Cara v. Haisley*, 347.

15. The promise of a married woman, made when under common-law disability of coverture, does not furnish consideration upon which her promise to pay the same debt, made after the disability is removed, can be sustained. *Kent v. Rand*, 784.

16. Married woman was attached as garnishee before a magistrate. She failed to appear, and judgment was rendered against her for debt, interest and costs. Between time attachment was laid and judgment rendered, husband of garnishee died. On bill filed to restrain execution, *held*, that, in absence of clear proof of fraud or surprise, unmixed with negligence or fault on her part, she had no standing. *Ahern v. Fink*, 347.

17. A married woman, in Kansas, can sue in her own name for alienation of husband's affections, &c. *Mehrhoff v. Mehrhoff*, 194.

18. In such an action, a complaint alleging that defendants began systematically to poison and prejudice husband's mind by telling him false stories about his wife, the plaintiff, and charging her with unwillingness and inability to do housework, and by treating her with gross disrespect in his presence, and, finally, by falsely and maliciously charging her, in his presence, with adultery, is not sufficient, except as to allegation of charge of adultery, and as to that it should be made more specific as to words, and time and place they were spoken. *Id.*

INFANT. See COMMON CARRIER, 9. CRIMINAL LAW, 19, 20. MASTER AND SERVANT, 17. NEGLIGENCE, 16. PARENT AND CHILD.

1. Decree of probate court in settlement of administration account concludes an infant whose guardian has notice and is present. *Simmons v. Goodell*, 407.

2. If appeal is not taken, decree has same effect as judgment of court of law. *Id.*

3. Errors in decree can be corrected only on appeal; errors in record of decree may be corrected any time. *Id.*

4. Where infant sold his claim against his guardian, for present consideration and promised to give receipt when he became of age, it is an executed contract. *State v. Rousseau*, 476.

5. Executory contract of infant requires express confirmation or new promise after coming of age; but ratification of executed contract may be inferred, and any acknowledgment of liability, or holding and treating property as his own, will amount to such ratification. *Id.*

6. A., an infant, had parents living, but who did nothing for his support, he being in almshouse, and sickly; B. was told by A.'s father, that A. would, at father's death, be worth \$10,000, and was requested by father to care for A., and B. after satisfying himself of truth of these statements, and relying upon credit of A.'s estate, removed A. from almshouse, and undertook and continued maintenance of A., for number of years. *Held*, that A. was liable for the necessities furnished him. *Trainer v. Trumbull*, 695, and note.

INJUNCTION. See ARBITRATION, 1, 2. BANKRUPTCY, 6. COPYRIGHT, 3. CORPORATION, 20-21. COSTS, 1. COVENANT, 3. EQUITY, 4, 13. HIGHWAYS, &c., 9. HUSBAND AND WIFE, 16. MORTGAGE, 15, 16. MUNICIPAL CORPORATION, 13. PARTNERSHIP, 11. RAILROAD, 5. TRADEMARK, 3. WATERS AND WATER-COURSES, 2.

1. Will not issue to restrain libel calculated to injure property. *Kidd v. Smith*, 730.

2. Under injunction bond, defendant is entitled to recover reasonable counsel fees necessary to get rid of injunction, but not compensation for his time and service, or for his mental strain and anxiety. *Cook v. Chapman*, 612.

3. A bill in equity and injunction is not proper remedy where municipal corporation has been organized, even though it is alleged that such organization was illegal and not in conformity to law. *McDonald v. Rehner*, 546.

4. When franchise or office is usurped, injunction will not lie to prevent such usurpation, even though respondents have not entered on duties of their office. The remedy is at law, by *quo warranto* to be invoked after entry into, or exercise of authority, by virtue of their election or appointment. *Id.*

INJUNCTION.

5. Injunction undertaking was conditioned for payment of damages "If it be finally decided that the injunction ought not to have been granted." On motion on part of defendants, and because co-defendants had not been served, court dismissed action without prejudice and injunction was dissolved, and costs paid by plaintiff. *Held*, that there was no breach of condition of undertaking. *Krug v. Bishop*, 476.

6. Complainant's bill alleged that he was part owner of a pilot boat, duly licensed, &c.; that defendants had combined to destroy his business and property, by divers publications and suits at law, impugning his right to use his vessel as pilot boat. Bill also alleged that defendants had bound themselves not to serve as branch pilots in certain district, with those outside the confederation, and that these acts would injure plaintiff's business. *Held*, that plaintiff had full remedy at law. *Francis v. Flynn*, 546.

INNKEEPER.

1. Receiving piano in character of innkeeper, and as property of guest, is entitled to lien for board and lodging, although piano is property of third person. *Cook v. Prentice*, 700, and note.

2. W., keeper of gambling-house, closed his business at 2 A. M., and visited an inn for purpose of depositing his money for safe keeping; he found inn in charge of night clerk; inquired for and was told he could have lodgings for the night; stated that he did not desire to go to his room then, but wished to leave some money with clerk, and would return in about half an hour. Clerk said he would reserve a good room for him. He did not enter his name. It was not upon any book of inn. No room was assigned to him. He left the money with clerk, received check for it, and departed. He returned in about three hours to have room assigned and retire. Clerk had absconded with money. *Held*, W. was not a guest at time of deposit with clerk, and innkeeper was not liable. *Arcade Hotel v. Wiatt*, 211.

INSANITY. See **CRIMINAL LAW**, 3. **LUNATIC.** *Will*, 16.

INSOLVENCY. See **ASSIGNMENT**, 6. **CONFLICT OF LAWS**, 7.

Insolvent law of Maryland does not operate to discharge contract with citizen of another state. *Glenn v. Clabaugh*, 737.

INSURANCE. See **COMMON CARRIER**, 20, 21. **CONTRACT**, 18. **JUDICIAL SALE**, 2.

I. Generally.

1. The surplus of earnings accumulated from operations of stock department of insurance company, run upon stock and mutual principles, the business of the two departments being entirely distinct and conducted separately, none of the earnings of stock department being paid to holders of mutual policies, upon winding up of stock department should be distributed among shareholders of funds of that department. *Ins. Co. v. Brown*, 793.

II. Marine.

2. In ordinary marine policy insurance against fire does not cover case of spontaneous combustion caused by inherent infirmity of goods insured. *Ins. Co. v. Adler*, 793.

3. In marine insurance, if article is injured by reason of its own inherent tendencies, and these tendencies are not called into activity by any perils insured against, insurer is not liable. *Ins. Co. v. Adler*, 468.

4. *Quære*, whether same rule applies in fire insurance. *Id.*

5. Action may be maintained for *pro rata* premium under continuation clause of marine policy, when vessel was at sea, at expiration of term of insurance, though a previous action had been brought on premium note and judgment therefor had been rendered. *Ins. Co. of N. A. v. Rogers*, 675.

6. In action for premium due on marine policy, which was in name of part owner for benefit of whom it may concern, defendant presented evidence of other insurance, which made an over insurance on his part of vessel, and claimed to be liable, if at all, for only a ratable proportion of the premium. *Held*, that if this proposition is sound, burden is on defendant to show that policies were simultaneous and not intended to cover interests of other owners. *Id.*

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7. THE EFFECT OF A RECENT DECISION ON THE LAW OF MARINE INSURANCE, 365.

III. *Life and Accident.*

8. Where insurance company contracted in writing to pay sum of money to personal representative of insured, it cannot be shown by parol that children were intended. *Elliott v. Herberts*, 348.

9. Where by-law of company allowed holder of policy to designate beneficiaries by endorsement signed and witnessed, *held*, that endorsement without signing was insufficient. *Id.*

10. Where policy is payable to personal representative of deceased, his administrator may maintain action for the money against next of kin who received it; but if estate is solvent they can retain their distributive shares. *Id.*

11. Duty of insured to keep alive his policy, assigned as collateral security to insuring company, just as much as if it had been assigned to any third person. *Grant v. Ins. Co.*, 282.

12. Where company is in habit of notifying insured through its local agent when premiums are due, it is bound to give notice before substituting another mode; but insured must act with reasonable diligence and six months delay to pay premium for want of notice is so unreasonable as to evidence purpose to abandon policy. *Id.*

13. It seems that a certificate for the payment of a premium to one holding a number next to that held by one who dies, and solely because he does die, is in nature of a wager on life of one in whom party benefited has no interest, and is therefore illegal. *The People v. Golden Rule*, 146.

14. When policy is issued and accepted upon express condition that answers and statements of application are warranted true in all respects, and if they are otherwise policy is to be void, an innocent mis-statement in matters material to the risk will render the policy void *ab initio*, though the premium paid may be recovered. *Ins. Co. v. Pyle*, 212.

15. While powers of insurance agent are *prima facie* co-extensive with business entrusted to his care, yet company may limit authority of its agents and thus bind all dealing with them with knowledge of limitation. *Ins. Co. v. Fletcher*, 407.

16. Application for policy contained provision that no statements or representations made, or information given to person soliciting or taking application for policy, should be binding on company or in any manner affect its rights unless reduced to writing and presented at home office in the application. *Held*, that such a stipulation is binding on the parties. *Id.*

17. Where by-laws of mutual benefit association provide that upon death of member benefit shall be paid to his direction, member may change beneficiary by surrendering his certificate of membership and procuring new one payable to person therein named. *Barton v. Provident Association*, 476.

18. Certificate of membership in mutual relief association may be reformed after death of member by inserting name of beneficiary, when it appears that secretary of association and assured both understood at time of application that proposed name should be entered upon record without further direction. *Scott v. Provident Association*, 477.

19. Where one whose judgment and will are overthrown by insanity takes his life by hanging, his act is not "suicide," as that word is used in accident policies, nor his injuries "self-inflicted," or his death "caused wholly or in part by infirmity or disease," but by injuries "effected through external, accidental and violent means." *Crandall v. Acc. Ins. Co. of N. A.*, 373, *and note*.

20. Where the last of several successive causes has produced an effect, the law will not regard the cause of that cause. *Id.*

21. Where an application for insurance differs from the policy issued thereon, it is not considered a part thereof, and admissions by insured in application as to extent of insurance do not limit insurers liability. *Id.*

22. By terms of policy insurance money was payable to assured, his executors, &c., for sole use and benefit of his four children therein named. *Held*, that insurance was payable not to children but to his legal representative, who would thereupon become trustee for children; and that company, before pay-

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ment to administrator, was not liable in trustee process at suit of creditor of one of children. *Stowe v. Phinney*, 613.

23. Policy was issued on husband's life in favor of wife, and she paid the premiums until her death, when by arrangement between company and husband the policy was allowed to lapse, and new policy was issued in favor of husband, of which old policy was part of consideration. *Held*, on interpleader between administrators of estates of husband and wife that insurance money should be divided in proportion of premiums paid by their respective estates. *Ins. Co. v. Haley*, 613.

24. A mutual beneficial association gave a certificate of membership to a member in sum of \$5000, whereby it promised upon proof of his death, that an assessment should be levied upon surviving members to the amount of the certificate which it would pay to his devisees or heirs. It was *held*, that a court of chancery had jurisdiction of a bill brought by heirs of the deceased member to enforce payment of the certificate, by compelling a specific performance of the contract. *Benefit Association v. Sears*, 147.

25. C. obtained certificate of life insurance from the United Order of the Golden Cross which provided that sum insured should be paid H. at C.'s death, which was done. *Held*, in action by C.'s executor against H. evidence was admissible to prove defendant promised C. that, after deducting from insurance money whatever C. owed him, he would pay balance to C.'s heirs. *Held, further*, that C.'s executor was proper party to bring suit on such promise. *Catland's Executors v. Hoyt*, 793.

26. Where, by terms of contract of life insurance, beneficiary named in policy, is entitled to participate in profits, a portion of which is to be applied each year in reduction of premiums and it has been custom of company to give notice of amount of premium and dividend and balance to be paid in cash, and company neglects to give such notice, knowing residence of beneficiary, and by reason thereof a premium is not paid at time specified in policy, company cannot set up such failure to pay as defence to recovery on policy, though by its terms same is forfeited on failure to pay premium on any of dates stipulated therein. *Ins. Co. v. Smith*, 407.

27. In such case where company has uniformly sent notices to insured (husband of beneficiary) and he has paid premiums, law will treat him in making such payments as agent for wife; but where husband wrote company shortly after notice sent, that he and wife had separated and that she had commenced proceedings against him for alimony and that he desired to have policy changed and made payable to his estate, company is not justified in treating him as her agent, either for purpose of surrendering policy or of receiving notice for her. *Id.*

28. Where in such case company repudiates contract and by its course of conduct clearly indicates that tender of premium after death of insured, if made would not be accepted, a failure to make such tender will not bar recovery on policy. *Id.*

IV. *Frs.*

29. Whether agent used reasonable diligence in cancelling a policy after being instructed so to do by company is a mixed question of law and fact; and where it appears that agent could have notified insurer of company's refusal to take the risk in half an hour and did not do so for several days, it will not be held that court before whom case was tried without a jury, erred in finding that agent was negligent; and an offer by agent to show custom of insurance agent to notify insured in such cases at their own convenience, and that they are given from five to ten days to cancel a policy, is inadmissible. *Ins. Co. v. Friswell*, 794.

30. In such case, the company having paid policy after proof of loss, may bring action against agent for amount so paid, immediately after such payment although the sixty days which it reserves as a time within which to pay the loss has not expired. *Id.*

31. Plaintiff signed application written by an "insurance broker" in office of defendant's agent. Defendant having returned application for further information to its agent, he turned it over to the broker aforesaid, requesting him

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"to go and get reply." The broker, though correctly informed by the assured, wrote false statement in application. This broker was not recognised as agent by the company or its agent. *Held*, that the writing of the false statements, in legal significance, was the act of the agent; that the knowledge of the broker was the knowledge of the company, and it was estopped from claiming a forfeiture; that defendant could not avoid its responsibility by repudiating acts of its agents, though done in part by a person employed by him. *Mullin v. Ins. Co.*, 675.

32. Plaintiff, in preparing proofs of loss, could properly employ his wife to make inventory of household goods destroyed; but when he made affidavit to same, without scrutiny or knowing it was correct, and it contained false statements, calculated and intended to work a fraud, he thereby made the fraud his own. And it was error for the court, on request, to refuse to so charge the jury and to put it on the theory of honest intention. *Id.*

33. A party applied to an insurance agent to procure insurance on certain property, leaving him to select the company. He forwarded application to certain insurance brokers in Chicago, who procured the policy in a company with which they had considerable dealing, and sent same to insured through first-named agents, whereupon he sent premium to Chicago agents, who failed to pay over same to insurance company. Policy contained usual clause that it should not be binding until actual payment of premium. *Held*, that liability of insurance company depended upon whether Chicago agents were its agents, and correspondence between them was proper evidence for purpose of showing their previous relations and methods of business, and as tending to show that the Chicago firm were, in fact, agents of the company and authorized to receive payment of the premium. *Sun Mut. Ins. Co. v. Saginaw Barrel Co.*, 147.

INTEREST. See **MORTGAGE**, 21. **USURY.**

INTOXICATING LIQUORS. See **CONSTITUTIONAL LAW**, 3, 5, 11. **CRIMINAL LAW**, II. **MUNICIPAL CORPORATION**, 16. **STATUTE**, 2.

A., duly licensed in Providence, sent liquors in bulk to B., in Hopkinton, where no licenses were granted, with agreement that they should remain A.'s property, but that B. might draw ten gallons at a time, as he wished, paying therefor when drawn. *Held*, that A. was illegally keeping for sale and selling liquor in Hopkinton. *In re Liquors*, 348.

JOINT STOCK COMPANY. See **RECEIVER**, 7.

JUDGMENT. See **BANKRUPTCY**, 5. **CONSTITUTIONAL LAW**, 40, 41. **CORPORATION**, 1. **FORMER RECOVERY**, 9. **MORTGAGE**, 1, 9. **NOTICE**, 1. **OFFICER**, 5. **RECEIVER**, 5, 6.

1. When jurisdiction over a case, of court of limited jurisdiction, depends on some fact which can be decided without deciding case on its merits, the jurisdiction may be questioned and disproved collaterally, although the jurisdictional fact is averred of record and has been on evidence actually found by court. *Bank v. Wilcox*, 613.

2. When suit is brought against an administrator, and judgment rendered, adding only after his name "administrator of estate of J. S. Adams," and whole record shows that suit was based on claim against the deceased person, court will, on motion, at subsequent term, permit the record to be amended so as to show that defendant was sued, and judgment rendered against him as administrator. *Adams v. Regua*, 348.

JUDICIAL SALE. See **DECEDENTS' ESTATES**, 3. **EXECUTORS AND ADMINISTRATORS**, 6, 16. **MORTGAGE**, 19.

1. Where parties take possession of property purchased by them at sheriff's sale, under circumstances that induced court of equity from considerations of public policy, to set sale aside, sale cannot be said to have been void, but relation of purchaser to execution creditor is like that of trustee to *cestui que trust*. *Paper Co. v. Langley*, 212.

2. Where *quasi* trustee has insured property of *cestui que trust*, for which, being burned, he receives insurance money, he is accountable therefor, less pay-

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ments in affecting and collecting insurance. *Paper Company v. Langley*, 212.

3. The conditions of a judicial sale were that purchaser should pay ten per cent. cash and balance by certain day; that, on non-compliance with conditions, property would be resold and first purchaser held liable for all loss incurred thereby, but not to receive benefit of any advance. A. purchased a lot, paid ten per cent. of his bid, and failed to pay remainder. The lot was resold for a sum in excess of A.'s bid sufficient to pay interest thereon and expense of second sale. *Held*, that A. was entitled to be repaid the ten per cent. *The Chancellor v. Gummere*, 147.

JURISDICTION. See **CONFLICT OF LAWS**, 9. **CONSTITUTIONAL LAW**, 46. **ERRORS AND APPEALS**, 2, 9. **JUDGMENT**, 1. **UNITED STATES COURTS**, 2-5.

JUROR AND JURY. See **WITNESS**.

LANDLORD AND TENANT. See **ACTION**, 3, 7. **COVENANT**, 1. **NEGLIGENCE**, 1. **REMOVAL OF CAUSES**, 8.

1. Tenant may remove buildings erected by him for better enjoyment of leasehold, during his rightful continuance in possession, if the removal can be accomplished without permanent injury to freehold. *Hedderick v. Smith*, 21, and note.

2. If tenant takes new lease without reserving right to remove buildings erected during previous term, he cannot remove same at expiration of new term; otherwise in case of mere extension of old lease upon same terms. *Id.*

3. A. having rented his land for a certain portion of the crop to be raised thereon, had no right to enter upon it, against the will of his tenant, even for the purpose of gathering the crop which was in danger of perishing. The contract was not a mere cropping agreement; the title to the crop was in the tenant, and the landlord had merely a lien thereon. *Wadley v. Williams*, 147.

LARCENY. See **CRIMINAL LAW**, III.

LEASE. See **RAILROAD**, 13.

LEGACY. See **WILL**, 3-5, 9-11

The entire personal estate of decedent ought to be returned in the inventory to Orphans' Court; but the title of a legatee to property specifically bequeathed him does not depend on its being included in the inventory returned by executors, nor, necessarily, upon a decree of distribution by the Orphans' Court. *Matthews v. Turner*, 282.

LIBEL. See **SLANDER AND LIBEL**.

LICENSE.

1. One who travels through country, carrying all necessary tools for putting up lightning-rods, charging so much for rods and so much for putting them up (never having sold any without putting them up) and soliciting patronage from house to house, is not bound to take out county license as pedlar, being rather a skilled mechanic than pedlar in sense of the law. *Ezell v. Tharsher*, 546.

2. Where license is a power coupled with an interest of permanent character, it is irrevocable; and if interest be in land and contract by parol, court of equity will hold contract binding, where licensee has incurred trouble and expense in carrying it out, notwithstanding Statute of Frauds. *Meetze v. Rd.*, 212.

3. Doctrine applied where railroad company, for certain privileges, was permitted by parol to construct upon plaintiff's land a dam, canal and water-wheel, for purpose of keeping its tank supplied with water. In such a case, upon withdrawal of such privilege by railroad company, plaintiff could not sue for use and occupation but only for damages for breach of special contract. *Id.*

LIEN. See **BANK**, 14, 15. **EXEMPTION**, 7. **INNKEEPER**, 1. **MORTGAGE**, 3. **VENDOR AND VENDEE**, 3, 4.

1. As a general rule, the equitable lien of the grantor of real estate for the price thereof, is not assignable, although there may be exceptions to this rule in
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favor of persons who merely stand as representatives of grantor. *Hammond v. Peyton*, 390, and note.

2. The lien itself is not in accordance with the policy of the law, and should be restrained rather than fostered. *Id.*

LIFE TENANT. See **EXECUTORS AND ADMINISTRATORS**, 3, 4. **TRUST AND TRUSTEE**, 3.

1. A conveyance to husband and wife, without words of limitation, render, them tenants by entireties; but such an estate may be limited to a life estates and words clearly expressing an intention to create an estate for their joint lives, and providing that after the termination of such life estate, the land shall be divided among the heirs of the husband and the heirs of the wife, creates a life estate in the husband and wife. *Haddock v. Gray*, 266, and note.

2. Land was conveyed to husband and wife with provision that survivor should hold the same until his or her death and after decease of husband and wife it should be equally divided between the heirs of each. *Held*, that the husband and wife were not tenants by entireties; that they did not take an estate in fee under rule in *Shelley's Case*, but the word "heirs," as used here, means "heirs apparent," and does not designate those who shall take an indefinite succession. *Id.*

LIMITATIONS, STATUTE OF. See **AMENDMENT**, 3. **CORPORATION**, 2, 3. **COVENANT**, 3. **LEADING ARTICLE**, p. 691.

1. Endorsement of payment on note barred by statute is to be regarded as an entry in holder's interest. *Coon's Appeal*, 77.

2. Where in such case, court below found that there was no evidence that such payment was made by maker or with his knowledge: *held*, that court above could not infer such payment from endorsement. *Id.*

3. Benefit of, may be had on general demurrer to petition, though special demurrer is the better practice. *Seymour v. P. C. & St. L. Rd.*, 212.

4. Action against railroad company to recover damages for killing or injuring domestic animal, killed or injured solely by neglect to fence road, as required by law, is founded upon "a liability created by statute, other than forfeiture or penalty" and is barred in six years. *Id.*

5. Acknowledgment of debt made to stranger and not intended to be communicated to creditor, will not remove bar of Statute of Limitations. *Parker v. Remington*, 675.

6. Two breaches were made of a bail bond. The creditor, plaintiff, brought an action of debt, alleging second breach. *Held*, that Statute of Limitations against an action on bond began to run at time of first breach, whether creditor knew of it or not, there being no fraud or concealment to prevent creditor obtaining knowledge of breach. *Pearce v. Curran*, 676.

7. Where principal and sureties gave their joint and several promissory note, upon which, after maturity, the principal debtor made several payments, the legal liability of all parties to note was discharged at expiration of six years from its maturity, and thereafter action could be maintained only on the new promise implied from partial payments, credited in note. *Walters v. Kraft*, 408.

8. But as such subsequent promise constituted a new contract and a new cause of action, no one is liable except him who made it; the liability of sureties was not continued by payments and promises of principal debtor, the relation of agency not existing between them. *Id.*

9. Purchase of intestate's lands at administrator's sale by agent of administrator with his means, who takes deed in his own name, and conveys to wife of administrator, is fraudulent, and though not void, the purchase and deeds may be avoided by one interested in lands. *McGaughey v. Brown*, 546.

10. Courts of equity, in cases of concurrent jurisdiction, consider themselves bound by Statutes of Limitations which govern courts of law in like cases, and this rather in obedience to statute than by analogy. *Id.*

11. Rule that Statute of Limitations will not bar a trust, applies only to express and positive trusts, and not to those where circumstances raise presumption of extinguishment of trust, or where open denial of trust is brought

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to knowledge of parties in interest, which requires them to act as on asserted adverse title. *McGuighey v. Brown*, 546.

12. The Statute of Limitations will commence against action for fraud of administrator from time of his discharge by probate court. *Id.*

13. Where the Statute of Limitations was set up as a defence to a contract, and the question was the constitutionality of an act removing the bar, passed after it had become perfect, *held*, that it merely took away a purely arbitrary defence to an action, which fell with the repeal of the law on which it depended, and such a defence is not a right of property protected by 15th Amendment to Constitution of United States. *Campbell v. Holt*, 148.

LIS PENDENS. See ATTACHMENT, 13. RECEIVER, 6.

To constitute, bill must be actually filed, having special reference to specific property, and subpoena must also be served upon defendant. *Sanders v. McDonald*, 77.

LUNATIC. See AGENT, 10.

1. Guardian of, may carry on ward's business. *State v. Jones*, 614.

2. Reasonable compensation only should be allowed for so doing, and the 5 per cent. rule should not always be adopted. *Id.*

3. Annual settlements and orders of approval made thereon by probate court are competent evidence to show that business was carried on under supervision of court, although there was no previous order. *Id.*

4. Such annual settlements are not conclusive, but subject to review at final settlement. *Id.*

5. Sureties in second bond given by such guardian, are not liable for excessive commissions retained by or allowed to such guardian in previous annual settlements under first bond. *Id.*

MALICIOUS PROSECUTION.

1. In an action of malicious prosecution, the burden of proving malice and absence of reasonable and probable cause is on plaintiff. *Abrath v. Northeastern Railway*, 757, and note.

2. Per Lord BRAMWELL: An action for malicious prosecution does not lie against a corporation aggregate, such a corporation being incapable of malice or motive. *Id.*

MANDAMUS. See COMMON CARRIER, 16.

1. Allegations of return to alternative writ of mandamus, should be stated positively, not upon information and belief. *State v. County Com.*, 349.

2. The rules requiring pleas to be sworn to, does not restrict defendant to pleading matters of defence within his personal knowledge. *Id.*

3. Mandamus will not issue to enable person to effect illegal purpose. *Id.*

4. If alternative writ of mandamus shows *prima facie* case, it is not demurrable. *State v. Mayor of Jacksonville*, 547.

5. Where writ alleges power in municipal body to levy taxes, and such power is limited by statute to certain percentage on value of taxable property, it is not necessary to allege in writ, that power has not been exhausted; that is matter of defence. *Id.*

6. Where levy of taxes is desired by judgment-creditor of municipality, for payment of his claim, whose right is based on ordinary status of judgment-creditor, and power of board of aldermen to make levy, a demand on proper officers for levy to pay judgment, must be made before relief by mandamus can be had. *Id.*

7. Where exercise of a discretion is involved, writ of mandamus will not be allowed against an inferior court or tribunal. So discretion of probate court as to time it will receive probate of will, or which of two papers purporting to be wills of same person, shall be passed on first, will not be interfered with by this writ. *People v. Knickerbocker*, 409.

8. R., resident of Michigan, filed petition in Delaware court, against S., president of D. Company, S. being resident of Delaware, and D. Company being Connecticut corporation, doing business in Delaware. Petition asked for mandamus to compel S. to allow R., who was stockholder of D. Company, to

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inspect and make copies of certain books and papers of D. Company, in possession of S., and which R. desired for use in suit in Michigan, between R. and third person. *Held*, that court had jurisdiction; that corporation was not necessary party, and that mandamus should be granted. *Swift v. State*, 594.

MARRIAGE. See **HUSBAND AND WIFE**, 1. **PRESUMPTION**, 1, 2**MASTER AND SERVANT.** See **CRIMINAL LAW**, 2. **INNKEEPER**, 2. **SLANDER AND LIBEL**, 1.

1. City is not liable for injury to laborer employed in constructing a sewer, when caused by negligence of one who had oversight and direction of work. *Conley v. City*, 676.

2. Where master delegates duties which law imposes on him to an agent, he is liable for injury to employee, due to negligence of such agent, whatever his rank. *Copper v. Louisville, &c., Ry.*, 283.

3. A foreman, except when master's duties are delegated to him, is a fellow-servant with those immediately under him, and master is not answerable to them for his negligence. *Id.*

4. One engaged in repairing tunnels on railroad, who is injured while being transported from one point to another on said road, is a fellow-servant of the engineer of train. *Id.*

5. A locomotive engineer and a section-master of track-workers, are not fellow-servants in sense that the company employing them would not be liable to one for damages resulting to him from negligence of other. *Calvo v. Rd.*, 409.

6. Where engine is thrown from track and engineer injured, through negligent violation of company's rules, by a section-master, the company is liable to engineer, the section-master being a representative of company. *Id.*

7. It is duty of master who sets servant to work in place of danger, to give him such notice and instruction as is reasonably required by youth or inexperience, or want of capacity of servant; and this duty is not confined to cases where servant is man of manifest imbecility. *Atkins v. Thread Co.*, 795.

8. To render master liable for injury to employee, caused by defective machinery furnished by former for latter's use, it must appear that master knew, or by exercise of proper diligence, could have known of its unfitness, and that servant did not know or could not reasonably be held to have known of defect. *Hall v. Hall*, 547.

9. Where a master or his representative has expressly promised to repair defect, servant can recover for injury caused thereby within any period which would not preclude rational expectation that promise might be kept, *provided*, that danger which plaintiff apprehended from beginning was not so imminent as to prevent a reasonably prudent man from risking it, upon assurance by proper authority that cause from which peril arose would be removed. *Dist. Columbia v. McElligott*, 409.

10. A roadmaster of a railroad company or conductor of a train are not so far agents of company as to be legally authorized to employ physician to attend employee injured by cars of company, unless they are specifically charged with that duty; but action of general manager ratifying such contract will render corporation liable. *Rd. v. Gray*, 547.

11. Plaintiff, while being driven in hired hack, was injured by its collision with railroad train, the accident being due to concurrent negligence of hackman and engineer, and sued railroad company. *Held*, that unless plaintiff exercised some control over conduct of driver further than to indicate places to which he wished him to drive, and required him to cross track at time injury occurred, negligence of driver was not imputable to him. *Little v. Hackett*, 213.

12. Co-employees, within the meaning of rule exempting master from liability for injuries sustained by one servant through negligence of another, are those whose usual duties bring them into habitual consociation, so that they may exercise a mutual influence upon each other promotive of proper caution. *Rolling Mill v. Johnson*, 148.

13. Where there is no opportunity to take measures to avoid the negligent acts of another without disobedience to the orders of an immediate superior, the doctrine exempting the master can have no application. *Id.*

MASTER AND SERVANT.

14. Master is not bound to fence machine where it is not of peculiarly dangerous character, and is not liable for personal injuries caused by machine to employee, who was obliged to pass it in going to his work, to whom suitable instructions had been given, having reference to his age and capacity, so as to enable him to understand dangers of employment in which he was engaged. Neither is master liable for injuries because machine might have been placed in less dangerous position. Evidence that a gate might have been placed in front of machine is immaterial. *Rock v. Indian Orchard Mills*, 794.

15. Where there was evidence that plaintiff was playing about machine on which he was injured, a statement in judge's charge that if jury found that to be a fact, plaintiff was guilty of contributory negligence, which would prevent him from recovering, is not open to objection. *Id.*

16. It is not charging upon the facts for a judge to state in his charge that a machine on which plaintiff was injured, was not a peculiarly dangerous one, the fact being self apparent. *Id.*

17. Where master employs, to work in dangerous place, servant who, from youth, inexperience, or ignorance, is unable to appreciate the danger, it is duty of master to explain same, and if, without such explanation, servant is set to work and is injured, master is liable, even though danger would have been apparent to person of capacity and knowledge, and immediate cause of injury is negligence of co-employees. *Jones v. Florence Co.*, 580, and note.

18. *Semble*. Duty of guarding against danger resulting from leaving loose stones or ore in roof or sides of mine, is one which employer may reasonably impose on miners themselves, but if neglect of it is brought to knowledge of master, and he takes no steps to remove danger, he is liable to employee, who, without contributory negligence, is injured thereby. *Id.*

MERGER. See **WATERS AND WATER-COURSES**, 9.**MINES AND MINING.** See **HIGHWAYS, &c.**, 3.

1. Revised Statutes, U. S., sect. 2322, gives owner of mineral vein or lode not only all covered by surface lines of claim vertically extended, but also right to follow that lode or vein when it passes outside those vertical lines laterally. *Mining Co. v. Cheesman*, 283.

2. Acts of Congress use words vein, lode or ledge as embracing a more or less continuous body of mineral lying within a well-defined boundary of other rock in the mass within which it is found, or it may be said to be a body of mineral or a mineral body of rock within defined boundaries in this general mass. *Id.*

3. A vein is not necessarily straight or of uniform dip, thickness or richness throughout its course; the cleft within which it is found may be narrowed or widened and even closed for a few feet and then found further on, and the mineral deposit may be diminished or even suspended for a short distance, but if found again in the same course with the same mineral within that distance, its identity may be presumed. *Id.*

4. No title from United States to land known at time of sale to be valuable for its minerals of gold, silver, cinnabar or copper, can be obtained under the pre-emption or homestead laws, or the town-site laws, or in any other way than as by the laws especially authorizing the sale of such lands, except in the states of Michigan, Wisconsin, Minnesota, Missouri and Kansas. *Deffenbach v. Hauke*, 148.

5. It would seem that there may be an entry of a town site, even though within its limits mineral lands are found, the entry and the patent being inoperative as to all lands known at the time to be valuable for their minerals, or discovered to be such before their occupation and improvement for residence or business, under the town-site title. *Id.*

MINOR. See **DOMICILE. GUARDIAN AND WARD. INFANT. PARENT AND CHILD.****MISTAKE.** See **AMENDMENT**, 2.**MORTGAGE.** See **BILLS AND NOTES**, 24. **CONFLICT OF LAWS**, 5. **CORPORA-**

MORTGAGE.

TION, 4. DEBTOR AND CREDITOR, 10. EQUITY, 14-16. EXEMPTION, 5, 15. RECEIVER, 3. USURY, 3.

I. Generally.

1. On bill to foreclose, decree was entered to pay within certain time and in default of such payment, appointing master to sell and deposit proceeds in registry of court. *Held*, that action of debt on judgment would not lie to recover sum mentioned in decree. *Burgess v. Souther*, 615.

2. Foreclosure proceedings in equity are of nature of proceedings *in rem*, and do not ordinarily act *in personam*. *Id.*

3. As against bondholders who presented their coupons at office of company for payment and not for sale, and who had right to assume that they were paid, person who advances money to take them up, under undisclosed agreement with company that coupons shall be delivered to him uncanceled as security for his advances, is not entitled to equal priority of lien. *Cameron v. Tome*, 477.

4. Though usual, it is not necessary that mortgage state amount of debt secured or that it is evidenced by note or other instrument. If it contains general description, sufficient to embrace liability intended to be secured and to put person examining record on inquiry, and direct him to proper source for information of amount of debt, it is sufficiently certain. *Curtis v. Flinn*, 548.

5. Mortgage to secure agreement to support another during life is assignable; and condition may be performed by assignee unless support is required by mortgage to be furnished personally. *Bank v. Holt*, 676.

6. And if assigned, amount agreed upon in good faith between the assignee and mortgagor to be paid for the support, is the sum to be paid by a subsequent mortgagee in redemption and not what a master found was actual cost of supporting, although agreement was made after second mortgage was given, the subsequent mortgagee taking mortgage with knowledge that there was controversy over what was to be paid on first mortgage. *Id.*

7. INCOME BONDS AND MORTGAGES, 553.

II. Of Chattels.

8. Foreclosure without sale is satisfaction only to amount of value of property. *Hazard v. Robinson*, 614.

9. After such foreclosure the bringing suit by mortgagee and obtaining judgment for whole debts presumptively waives foreclosure and leaves mortgage subject to redemption in equity. *Id.*

10. A. mortgaged shares of stock by charter transferable by deed, and then by deed assigned his property for benefit of creditors to B., who conveyed it by deed to C. under same trusts. C. died. *Held*, on bill to redeem, that C.'s personal representative was necessary party to suit. *Id.*

11. Instrument executed by partner, in firm name, and legally binding upon partnership, and entitled to be recorded, may be admitted to record upon acknowledgment by executing partner. *McCoy v. Boley*, 349.

12. Mortgage duly recorded is not void between parties or as to third person, whose claim is not based on valuable consideration, because it permits mortgagor to sell personal property covered by it without accounting to mortgagee for proceeds. *Id.*

13. Sale or mortgage of crop to be planted, as well as one planted, and in process of cultivation, is valid—provided place where crop is to be produced is designated with sufficient certainty. It seems parol evidence is competent to fit description to property. *Rountree v. Britt*, 350.

14. Mortgage conveying "my entire crop of every description" is too vague. *Id.*

15. Mortgagor will be prevented by injunction from impairing or destroying property embraced in mortgage lien. *Logan v. Slade*, 743.

16. When merchant, on day after execution of mortgage on his stock of goods in favor of some of his creditors, disposes of large amount of them to other creditors, in payment of their debts, court can enjoin him from selling said goods otherwise than for cash, and command him to pay proceeds, after deducting expenses of sale, into registry of court, and if remedy by injunction proves

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to be ineffectual, court may appoint receiver to take charge of goods, and dispose of them under its direction. *Logan v. Slade*, 743.

III. Of Realty.

17. Dated before, but recorded after deed to mortgagor, is notice to subsequent purchaser. *Semon v. Terhune*, 461.

18. Mortgagor who pays bond after property has been sold under foreclosure and proceeds of land have become primary fund for payment, is entitled to subrogation. *Id.*, and note.

19. Absence of one of the two trustees from foreclosure sale not sufficient, of itself, to cause sale to be set aside, as against former owner of land. *Smith v. Black*, 78.

20. Presumption of payment in favor of mortgagor in possession over twenty years may be rebutted. *Brown v. Hardcastle*, 78.

21. Where bond is given conditioned for payment of sum named, with one per cent. interest thereon, by particular day, creditor is entitled to the legal interest thereafter. *Id.*

22. Mortgage will not sustain recovery in action of ejectment against holder of legal title, nor will deed of conveyance made by master under decree in suit to which person owning legal title at institution of suit was not party. *Berlack v. Halle*, 548.

23. A deed absolute in form, intended, however, to secure payment of money due from maker to grantee, and, upon payment of which, by certain time grantee agreed to reconvey property to grantor, though in equity a mortgage is not one at law; therefore, to make it available against creditors of grantor it need not be recorded as a mortgage, if it be recorded within time prescribed for registration of deeds for conveyance or encumbrance of lands in Ohio. *Kemper v. Campbell*, 409.

24. When surety on mortgage debt pays same to holder and receives note and mortgage, without any assignment or discharge written thereon, he cannot maintain bill in equity against owners of equity of redemption, praying that mortgage "may be decreed to be still subsisting, that he may be subrogated to the rights of the mortgagee therein, and may be empowered to foreclose the same according to law." *Lynn v. Richardson*, 795.

25. A. purchased real estate from B., subject to the payment of a mortgage thereon to C. Held, that even though A. had expressly promised B. to pay the mortgage debt, this would not, without the consent of C., convert B. from a principal debtor to a surety; and the relation of principal and surety not existing between A. and B., an extension of the time of payment of the mortgage debt, granted by C. to A., would not discharge B. from his liability to C. *Shepherd v. May*, 149.

26. Mortgage made by B. and wife to secure loan from A. would have been valid, if sealed. C. attached B.'s interest in the realty, whereupon A. filed bill against B., his wife and C., charging accident and mistake as cause of mortgage not being sealed, actual notice of paper on C.'s part, and praying reformation by sealing. C. demurred. Demurrer overruled. *Bullock v. Whipp*, 349.

27. A man cannot allow another to part with money, on faith of conveyance, and then taking advantage of defect known to himself, claim a title better in equity by subsequent conveyance. *Id.*

28. By a well established general rule, the word "heirs," or other appropriate words of perpetuity, in a mortgage or deed, is essential to pass a fee simple estate; but where the language used in a mortgage, and the recitals and conditions thereof, plainly evidence an intention to pass entire estate of mortgagor as security for the debt, and express provisions of the instrument cannot otherwise be carried into effect, it will be construed to pass such estate though no formal words of perpetuity are employed. *Brown v. Bank of Hamilton*, 400.

29. K. executed and delivered to T. three notes, payable to T.'s order, due in one, two and three years, and a mortgage to secure their payment. Before maturity of any of notes, T. endorsed them all, waiving demand and notice, and delivered them to A. with assignment of mortgage. The first note due, not being paid at maturity, was put in judgment against K. as maker, and T. as endorser. K. being insolvent, T. paid the judgment. Subsequently T.

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commenced suit to foreclose mortgage, claiming benefit of that security and a lien prior to lien of A. who held remaining two notes, then past due. A., by answer and cross petition, alleged facts showing T.'s liability as endorser on the two notes, that K. was insolvent, that land would prove insufficient to satisfy whole mortgage debt, claiming priority of lien, praying foreclosure and full relief. Later S., on his motion, became plaintiff and filed supplemental petition, averring purchase from T. and assignment of all his interest in mortgage and suit, and claiming priority of lien. The land was sold and not enough realized to pay whole indebtedness. *Held*, that A. was entitled to payment in full from proceeds before application of money to claim of S. *Anderson v. Sharp*, 410.

MUNICIPAL CORPORATION. See CONSTITUTIONAL LAW, 1, 18-21, 36-7. COSTS, 1. DAMAGES, 3-5. HIGHWAYS, &c., 3-7. INJUNCTION, 3. MANDAMUS, 5, 6. MASTER AND SERVANT, 1. NEGLIGENCE, 3. OFFICER, 3-6. STATUTE, 2. TAX AND TAXATION, 9, 10.

I. Generally.

1. It is duty of a city to keep its streets in a reasonably safe condition, for neglect of which it is liable. *Bellamy v. City*, 284.

2. If defect causing injury has existed for some time, the city is chargeable with notice of it. If the city could have ascertained the defect, its failure to do so is negligence, and a charge that the defect must be open and notorious is error. *Id.*

3. In authorizing city counsel of Baltimore to "settle their rules of procedure," the legislature did not confer power to declare what number of members should constitute a quorum. *Heiskell v. The Mayor, &c.*, 792.

4. In a municipal corporation, consisting of a definite number, in the absence of any legislation on the subject, a majority of the members constitutes a quorum. *Id.*

5. A mere majority of the members elected being present, the acts of city council of Baltimore are valid, notwithstanding the existence of a rule adopted by the council, that two-thirds of members elected shall be necessary to constitute a quorum. *Id.*

6. A municipal corporation cannot, by a rule made by itself, increase or diminish its powers. *Id.*

7. Where duties delegated to officers elected by public corporations, are political or governmental, the relation of principal and agent does not exist, and the maxim *respondent superior* does not govern. *Summers v. Board*, 284.

8. Counties are not liable for injuries caused by negligence of commissioners in selection of unskilful physician for care of poor. *Id.*

9. Though city of Atlanta, Ga., by its charter, has right to establish a system of grading and drainage, yet the work must be done so as not to prove a nuisance to citizens, or municipality will be liable for damages. *Smith v. City of Atlanta*, 283.

10. If a sewer becomes a nuisance, and the city, having alone power to abate it, fails to do so, it may be said to keep it up, and thereby becomes liable as for maintenance of a continuing nuisance. *Id.*

11. If bill in chancery be brought in name of town without authority of electors given at town meeting, court may dismiss same on motion of defendants or on its own motion. *Kankakee v. Kankakee Rd.*, 615.

12. Under Illinois system of township organization there is no officer or board representing corporate authority of town; the electors through town meetings alone do so. *Id.*

13. It is probable that in extreme cases of threatened invasion or destruction of property rights of town, any taxpayer may prevent such wrong by injunction. *Id.*

14. The fact that city has already exhausted its constitutional power to incur debt cannot be shown to defeat proceeding by it to improve street through special assessment in part and partly by general taxation. That question cannot arise until city seeks to borrow money or incur an indebtedness in that regard. *Ry. v. City*, 410.

15. A city is not liable for acts of officers of its fire department, unless made so by statute or act complained of was expressly ordered by city government;

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they are public officers and not servants of municipality. *Burrill v. City of Augusta*, 548.

16. Cannot make its want of legal authority to engage in particular business (e. g., distillation and sale of spirits), a shelter from the taxation on such business; nor escape taxes due on its property, whether acquired legally or illegally. *City v. Hollister*, 477.

17. Judgment and discretion of, in selecting plan of drainage is not subject to revision in private action for not sufficiently draining particular lot of land: but for negligence in construction and repair of sewers municipality is responsible to person whose property is thereby injured. *Johnson v. District*, 477.

18. Cities and villages incorporated under the general Incorporation Act of Ill. giving power "to regulate the police of the city or village, and pass and enforce all necessary police regulations," may pass an ordinance prohibiting persons from keeping open stores for sale of goods on Sunday, and provide penalty for violation of same. Such an ordinance is not inconsistent with section 261 of Criminal Code, and the police regulations of a village may differ from those of the state on the same subject, if not inconsistent therewith. *McPherson v. Village of Chebawee*, 149.

19. City council, under Illinois Incorporation Act, may grant to individuals or private corporation right to lay railroad tracks in streets, connecting with public railway tracks previously laid, and extending to manufacturing establishments, &c., of those laying the tracks, but in such case tracks so laid become, in legal contemplation, part of railway with which they connect, and are open to public, and subject to public control in all respects as other railway tracks. All railroad companies are required by law to permit such connections. *Chicago Co. v. Garrity*, 609.

20. No corporation or individual can acquire exclusive right to use of city streets. *Id.*

21. Where, by its charter, a city had power to pass ordinances to remove nuisances from streets, and for preservation of peace and good order, and in pursuance thereof had prohibited "any sport, play or exercise that might produce bodily injury or endanger property on any street, square or alley, within the city limits," in an action against the municipality for injuries to plaintiff caused by his being knocked down, while crossing a street, by a sled on which boys were coasting, it was *held*, 1st, that defendant was under obligation to exercise for public good the powers conferred on it by its charter, and that this duty was not discharged by merely passing ordinances; a vigorous effort must be made to enforce them. 2d. If defendant made vigorous efforts to prevent nuisances complained of by enforcing its ordinance on the subject, it was relieved from responsibility. 3d. Whether such efforts had been made was a question for the jury. *Taylor v. Mayor*, &c., 284.

II. Bonds of.

22. A county court was authorized to issue bonds for a subscription to such amount of stock of railroad as should be proposed by certain commissioners and approved by majority of voters of the county. *Held*, that bonds issued in excess of this amount were void, and that certificate of judge of county court on back of each bond that it was issued as authorized by statute, cannot estop county to deny that the particular bond is void, because county court, at time of its issue, had exhausted power conferred by act of legislature and vote of people; nor can payment of interest on all bonds ratify bonds issued beyond lawful limit, as county cannot ratify what it could not have authorized. *County v. Davies*, 411.

23. Where legislature dissolves municipal corporation, and incorporates substantially the same people as municipal body under new name, for same general purpose, and great mass of taxable property of old corporation is included within limits of new, and property of old corporation used for public purposes, is transferred without consideration to new corporation for same public uses, the latter, notwithstanding great reduction of its corporate limits, is successor in law, of former, and liable for its debts. *Mobile v. Watson*, 213.

NATIONAL BANK. See **BILLS AND NOTES**, 16.

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NEGLIGENCE. See BAILMENT, 4, 5. BANK, 2, 7-9. COMMON CARRIER, 2, 5, 9, 12, 19, 20. CORPORATION, 4, 5. DAMAGES, 3-5. FRAUD, 2. INSURANCE, 30. MASTER AND SERVANT, 2-6, 8, 11-15, 17, 18. MUNICIPAL CORPORATION, 1, 2, 15, 17, 21. RAILROAD, 10-12. TELEGRAPH, 5-7. WATERS AND WATER-COURSES, 1.

1. Tenant who erects insecure fence is liable for injuries to passer-by occasioned by fall of fence after tenant had surrendered premises. *Hussey v. Ryan*, 477.

2. When a person voluntarily walks along railroad track in public thoroughfare, which he knew was used as a switch-yard on which locomotives were passing night and day, where walking on either side of track was as good as on track, and is killed by passing train, his representative cannot recover. *Louisville Rd. v. Yniestra*, 350.

3. It is settled law in Maine, that in an action against a town to recover damages for death of person alleged to have been caused by negligence of town in not keeping highway in repair, burden of proof is on plaintiff to show due care on part of deceased. *Merrill v. Inhabitants of North Yarmouth*, 676.

4. A person undertook to drive over a road across which was a flowing stream of water thirty yards wide, and in some places three feet deep, with swift current, on which were floating large blocks of ice. In some way he and his horse got out of the road, were precipitated into deeper channel of river below and drowned. *Held*, that one who knowingly and unnecessarily exposes himself to such perils, cannot be regarded as in the exercise of due care. *Id.*

5. In action for personal injuries sustained on leaving rear car of train at station, evidence that others had previously been directed to take that car, and on alighting from it as plaintiff did, had been injured, is competent to show negligence on part of defendant in not providing suitable stopping place, and that plaintiff was not negligent in getting off train. *Bullard v. Rd.*, 795.

6. Action to recover damages for personal injuries to plaintiff's intestate, where evidence showed that deceased was burned by a quantity of starch which escaped from a boiler, but failed to disclose that boilers were improperly constructed or out of repair, and that accident was not due to carelessness of deceased, cannot be maintained. *Blanchette, Adm'r., v. Border City Mfg. Co.* 795.

7. One who makes excavation on his lot in such manner as to cause a pit-fall upon adjoining lot is liable, in absence of contributory negligence, to one who resides on latter, for death of his child, caused by falling into such pit. *Mayhew v. Burns*, 284.

8. But in such case, evidence that plaintiff's poverty prevented his employing any one besides his housekeeper to take care of his children, is inadmissible in question of contributory negligence; and if he knew of the danger and could by reasonable exertion have averted it, his failure to do so will prevent a recovery. *Id.*

9. Where fire is negligently thrown from mill smoke-stack and carried to building outside of the mill property, and thence to another building of third party, and thence to other property that is damaged by fire, whether such negligence is proximate cause of damage is for the jury. *Adams v. Young*, 561, and note.

10. Defendant dug pit under cotton gin for cotton press, near public highway, and left it unenclosed, corn and cotton seed being scattered about it. Plaintiff's cow fell into pit and was killed. *Held*, that defendant was guilty of negligence and must pay value of cow, and that plaintiff was not-guilty of contributory negligence in turning cow out on commons remote from gin. *Jones v. Nichols*, 549.

11. While railroad company cannot be said to owe no duty to one who unlawfully intrudes upon its engines or cars, it does not owe him same duty it owes to passengers or employees. *Darwin v. Rd.*, 411.

12. Where trespasser gets without authority upon most dangerous place on railroad engine and is killed, he is guilty of contributory negligence and no recovery of damages for his death can be had against company, even if it had been guilty of negligence, and engineer knowing the person was in place of danger did not warn him off. In case of passenger, rule would be different. *Id.*

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13. If plaintiff in case of personal injury can show negligence on part of defendant without at same time showing contributory negligence on his own part, then such contributory negligence is matter of defence and burden of proof is on defendant. *Texas, &c., Rd. v. Orr*, 548.

14. Railroad companies, as a rule are bound to keep in safe condition all portions of station ground and approaches to platform where passengers would be likely to go, especially those places where by custom of company they do go. *Id.*

15. That injured party does not adopt best remedies or follow implicitly physician's directions will not excuse wrongful injury which directly produces disease from which death ensues. It is for jury to pass on reasonableness of decedent's conduct and whether death was caused by the injury. *Id.*

16. Young child strayed from its home to railroad track, crossed track and fell into adjoining trench. Track was not fenced on trench side. *Held*, that company was as to plaintiff child under no obligation so to fence its tracks, that plaintiff child could not get from them on to adjoining land. *Morrissey v. Rd.*, 350.

17. On demurrer to declaration against corporation, its charter is not before the court. *Id.*

18. Where a person has so made the way leading to building on his premises, as to invite people to pass along the way to such building, he is bound to keep the way clear of dangers; and it is not necessary in such case that person using way should be traveller on highway. *Croghan v. Schiele*, 743.

19. Where fire is negligently thrown from a mill smoke-stack and carried to building outside mill property, and thence to third party's building, and thence to building damaged, whether such negligence is proximate cause is for the jury under court's instructions. *Adams v. Young*, 213.

20. In action against mill owner for damages to property caused by fire so thrown and carried to property by gale of wind blowing at time in direction of property; where the conditions continue the same as when negligent act was done, it is no defence that fire first burned intervening building and was thence communicated by sparks and cinders in some manner to building in question; though buildings were 200 feet apart. *Id.*

21. In order to support a recovery against a railroad corporation on account of an injury or death, caused by a collision with its train at a crossing, whether the action be in form civil or criminal, it must appear affirmatively: 1. That the defendant corporation was guilty of negligence. 2. That its negligence was the cause of the accident. 3. That the injured party was in the exercise of due care and diligence at the time of the injury, or, at least, that the want of such care on his part in no way contributed to produce it. *State v. Rd.*, 150.

22. It is negligence to attempt to cross the track of a railroad without looking and listening so far as there is opportunity to do so. *Id.*

23. Person waiting at railroad station for passage on train soon to depart, who is invited by ticket agent to sit in empty car, standing on side track, while station room was being cleaned, is entitled to same protection from company while in car as if in waiting room; in either place he is a passenger. *Shannon v. Rd.*, 549.

24. For passenger to jump off or on moving train is *prima facie* negligence; whether he had reasonable excuse for so doing is usually question for jury, though extreme case either way may be determined by court. Fear of personal danger is not only excuse that will exonerate one in jumping from moving train; in some cases he may be justified in so doing to save himself from serious inconvenience, but all depends on speed of train and attendant circumstances. *Id.*

25. Where there is no evidence of want of capacity or discretion in a minor suing a railroad company for personal injury, and he is present at trial and it appears his parents permitted him to go unattended to school in a large city a considerable distance from his home, it was held error to instruct the jury that if they believed from the evidence that the plaintiff, at the time and place of the injury, was of such tender years and was so immature, that the requisite capa-

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city to exercise proper care was wanting, then the law would not impute negligence to him. *Rd. v. Eininger*, 149.

26. In a suit by plaintiff against a railway company to recover for an injury received from a passing train at a public street crossing—not in attempting to cross the track along the street, but while unlawfully walking along the track as a footway—it was held error to instruct the jury that if the injury happened because of there being no flagman at the railroad crossing, contrary to a city ordinance, then the plaintiff was entitled to recover. Under the facts the company owed no duty to the plaintiff in respect to a flagman. *Id.*

27. FELLOW-SERVANTS, 481.

28. NEGLIGENCE IN IMMINENT PERIL, 617.

NEGOTIABLE INSTRUMENT. See BILLS AND NOTES.**NONSUIT.**

Before opening his case plaintiff may become nonsuit, as a matter of right; after opening and before verdict, in the discretion of the court. *Washburn v. Allen*, 78.

NOTICE. See ATTACHMENT, 12, 13. BANK, 11, 22. BILLS AND NOTES, 23-25. EVIDENCE, 22. MORTGAGE, 4, 17, 26. MUNICIPAL CORPORATION, 2. SALE, 8.

1. Without proof of, unregistered title is void against subsequent judgment-creditor of grantor. *Executors of Hodge v. Amerman*, 214.

2. Burden of proving notice in such case is on holder of unregistered title. *Id.*

3. Constructive notice of unregistered is as effectual as actual. Possession (which may exist without actual residence), if open, notorious, exclusive and unequivocal, will constitute notice. It is not necessary to show that person, to be affected, knew of other's possession, if of such a character as to constitute notice. *Id.*

4. H. conveyed to S. real estate, deed for which was not recorded until after third person, who had levied upon same real estate before conveyance, brought action against H. for possession. Held, that S. was purchaser *pendente lite*. *Smith v. Hodgson*, 615.

5. A purchaser of real estate *pendente lite* is chargeable with notice of character of suit, and of extent of claim asserted in pleadings, in reference to title of such real estate, without express or implied notice in point of fact. *Id.*

6. The litigating parties are exempted from taking any notice of title so required. *Id.*

NUISANCE. See EQUITY, 13. MUNICIPAL CORPORATION, 9, 10, 21.

OFFICER. See CONSTITUTIONAL LAW, 7, 16, 17, 44, 45. SURETY, 4, 3.

1. That one transacts his business in his dwelling does not make it lawful for an officer to break the outer door to serve process. *Welsh v. Wilson*, 190, and note.

2. Where the sheriff makes an unlawful levy, and is sued for trespass, it cannot be taken in mitigation of damages that, pursuant to such levy, he sold the goods and paid proceeds to execution creditor. *Id.*

3. Where an officer is "subject after hearing to removal by the mayor, by and with the advice and consent of the aldermen," the hearing must be by the "board of mayor and aldermen." Hearing by aldermen alone is insufficient, even if by officer's consent. *Andrews v. King*, 79.

4. Where officer is removable in manner above stated, for "inefficiency or other cause," mayor and aldermen must find sufficient cause to exist as matter of fact, and so adjudicate, before valid order of removal can be made. *Id.*

5. Persons accepting position of school directors must defend suits against district, and protect its property, to the best of their skill and ability, regardless of any private interest they may have. *Noble v. Directors*, 743.

6. If such directors interpose no defence and allow decree to pass in their favor against some of them, it may be set aside on bill by district and defence allowed. *Id.*

7. Statute fixing annual salary of public officer at named sum, without limita-

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tion as to time, should not be deemed abrogated or suspended by subsequent enactments which merely appropriate a less amount for the services of that officer for particular fiscal years, and which contain no words that expressly, or by clear implication, modify or repeal the previous law. *United States v. Fisher*, 109 U. S. 143, and *United States v. Mitchell*, Id. 146, distinguished. *United States v. Langston*, 549.

ORDINANCE. See **CONSTITUTIONAL LAW**, 36, 37.

PARENT AND CHILD. See **ACTION**, 8, 9. **ADVANCEMENT.** **EVIDENCE**, 11. **NEGLIGENCE**, 7, 8, 25.

When minor son makes contract for his services on his own account, and father knows of it without objecting, father cannot recover of employer wages paid the son; and in such case question is not whether son was emancipated, but whether father knew of contract and made no objection. *Atkins v. Sherbino*, 676.

PARTICULAR WORDS AND PHRASES.

1. "Act of God." *Davis v. Rd.*, 650, and note.
2. "Control." *Car Co. v. Rd.*, 140.
3. "Caused wholly or in part by infirmity or disease." *Crandell v. Ins. Co. of N. A.*, 386, and note.
4. "Effected through external, accidental and violent means." *Id.*
5. "Debt." *Holcomb v. Winchester*, 70.
6. "Proved." *Tyre & Spring Works Co. v. Spaulding*, 285.
7. "Reasonable doubt." *Davis v. People*, 142.
8. "Telephone." *Hockett v. State*, 317, and note.
9. "Vein, lode or ledge." *Mining Co. v. Chessman*, 283.

PARTITION. See **DOWER**.

1. Decree of partition not appealed from in probate court is conclusive upon parties and privies as to title at time of its rendition; and they are estopped to claim a greater interest in the land than the share decreed them. *Davis v. Dargin*, 798.

2. In chancery suit for partition where defendant impeaches complainant's title on equitable grounds, the court will not suspend the suit until the title be settled, but will pass upon such title and settle all disputes concerning it in the partition suit, and grant relief accordingly. *Read v. Huff*, 150.

PARTNERSHIP. See **ASSIGNMENT**, 7. **CONTRACT**, 8. **EXEMPTION**, 6, 8. **MORTGAGE**, 11. **RECEIVER**, 5, 6. **REMOVAL OF CAUSES**, 7.

1. Individual interest of copartner in firm effects is attachable. Attachment may be made by seizure of effects, and officer may remove them for safe keeping. *Trafford v. Hubbard*, 677.

2. That defendant has overdrawn his account with firm, does not invalidate attachment; but the execution by him of general assignment for benefit of creditors, dissolves it. *Id.*

3. One may contract with particular member of a firm, for an interest in his share of profits, without making himself a member of such firm and liable for its debts. *Meyer v. Krohn*, 411.

4. Proof of mailing notices of dissolution of partnership and retirement of certain members thereof, properly addressed to persons having had prior dealings with firm, is *prima facie* evidence that notices were received by those parties, but such presumption may be rebutted by proof to the contrary. *Id.*

5. In non-trading partnerships (e. g., one for conducting a theatre) presumption is that individual partners have not authority to bind firm by note in firm name. This presumption may be overcome by proof of express authority, or state of facts justly implying authority. *Pease v. Cole*, 744.

6. Where one partner was township treasurer, and with knowledge of copartner deposited township funds to firm credit, *Held*, that each was *particeps criminis*, and that as to such funds the law will aid neither party against the other. *Davis v. Gelhaus*, 214.

7. Where M. was to conduct a saw-mill, pay its expenses from the proceeds, and divide the net profits with two others, who with himself owned the mill

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property, there was clearly a partnership between the parties. *Camp v. Montgomery*, 151.

8. The rule that there may be a valid partnership although one or more of the parties are guaranteed by the others against loss prevails in Georgia, notwithstanding the last clause of section 1890 of the code provides, that a "common interest in profits alone does not constitute a partnership." *Id.*

9. If parties go into an adventure, one furnishing money or stock and the other skill or labor, and to share the net profits, they are partners, since they have a joint interest in the profits as contradistinguished from the common interest. *A fortiori*: is there a partnership where, in addition to this, there is a joint interest in the property used. *Id.*

10. Upon application for receiver of partnership the only question for consideration is, whether on the facts disclosed, it is apparently necessary in order to protect partnership assets until rights of partners can be determined on full hearing of case; and in determining the propriety of such action, the averments of the answer will be considered as well as the allegations of the bill. *Hefebower v. Buck*, 284.

11. Where settlement of partnership affairs is nearly at an end, and it is manifest that to grant an injunction and appoint a receiver would probably cause unnecessary trouble and expense, without substantial benefit to any parties concerned, the application will be denied unless the facts show danger to partnership assets in hands of selling partner, by reason of insolvency or otherwise, or some clear breach of duty or conduct amounting to fraud on his part. *Id.*

PARTY WALL. See COVENANT, 4.**PATENT.** See EXECUTION, 2. PAYMENT, 3. TELEPHONE, 2.

1. Cannot be taken out for article old in purpose, shape and mode of use, when made for first time out of an existing material, and with accompaniments before applied to such article. *Gardner v. Herz*, 478.

2. Plaintiff was patentee of combination lock, the essential feature of which was turning bolt. He granted no licenses, but manufactured locks himself, being fully able to supply the demand. Defendant, infringing on plaintiff's patent, sold a lock having the turning bolt device, at a reduced price, forcing latter to do same in order to hold his trade. *Held*, that defendant's infringement must be considered to have caused entire loss of plaintiff, by reduction in prices, after allowing proper sum for any other patented device contained in defendant's locks, and for any other causes which gave to defendant an advantage in selling his locks. *Yale Lock Co. v. Sargent*, 411.

PAYMENT. See CONFLICT OF LAWS, 3. DEBTOR AND CREDITOR, 6. MORTGAGE, 29. SURETY, 43.

1. Action will not lie to recover taxes illegally assessed and voluntarily paid. *Dunnell Co. v. Newell*, 350.

2. Tax is not paid under compulsion merely because collector holds warrant for levy or distraint, but if paid under protest tax illegally assessed may be recovered. *Id.*

3. A. relying wholly on representations of B., made without fraud, contracted to pay and did pay B., fixed sum for privilege of working under certain patent, of which he was owner. It afterwards turned out that patent was void: *held*, that A. could not recover his money. *Schwarzenbach v. Odorless Co.*, 744.

PENALTY. See DAMAGES, 1.**PHYSICIAN.** See CONTRACT, 12.**PLEADING.** See ACTION, 4. ATTACHMENT, 11. BILLS AND NOTES, 20, 21. COMMON CARRIER, 6. CRIMINAL LAW, 13, 14, 21. FRAUDS, STATUTE OF, 8. HUSBAND AND WIFE, 8. MANDAMUS, 1, 2. SET-OFF, 1. SLANDER AND LIBEL, 2, 3.

1. Counts in covenant and case may be joined in a declaration on a single cause of action. *Crawford v. Parsons*, 412.

PLEADINGS.

2. Answer of failure of consideration must set out facts showing failure ; and error in sustaining demurrer to such an answer is not rendered harmless, merely because general plea of want of consideration is left standing. *Tyler v. Anderson*, 570.

3. Plaintiff received consignments from defendant, who is owner of three different mills, one being carried on in his own and the other two under different names, but being ignorant of this fact, plaintiff kept the three accounts separate. In action brought by plaintiff to recover balance of account with mill run under name of defendant, where answer is general denial and payment, defendant not allowed to show balance due him on account between plaintiff and another of the mills ; such balance can only be availed of by way of set-off ; and defendant cannot show that there were in plaintiff's hands goods from mill run under defendant's name not included in account sued on. *Talcott v. Smith*, 795.

PLEDGE. See **ATTACHMENT**, 3, 4.

POSSESSION. See **DEBTOR AND CREDITOR**, 1. **NOTICE**, 3, 18.

POWER.

1. Where testator invests his widow with life estate in his property, with power to dispose of remainder to his heirs, an attempted appointment in such manner as to secure to herself a substantial pecuniary benefit not authorized by testator is void. *Shank v. De Witt*, 412.

2. An honest misconstruction of power conferred, will not save exercise of power, if true purpose of it is violated. *Id.*

PRACTICE. See **CONTEMPT**, 1. **EQUITY**, 1, 2, 13. **ERRORS AND APPEALS**, 3, 6. **EVIDENCE**, 13, 23. **EXECUTORS AND ADMINISTRATORS**, 7. **INJUNCTION**, 5. **MASTER AND SERVANT**, 16. **NONSUIT**. **RECEIVER**, 1. **SET-OFF**, 4. **TRUST AND TRUSTEE**, 4. **WILL**, 18, 19.

Under stipulation of parties, a case was tried by a Circuit Court, without a jury, and judgment entered finding certain facts, and, as a conclusion of law, the issues joined for defendant. On same day stipulation was filed, that on the trial certain facts were "proved." *Held*, that stipulation was not an agreement as to existence of any facts, but merely a statement as to what the proof showed on the trial ; and, therefore, as to any facts stated in stipulation to have been shown by proof at the trial, if they were not contained in the special findings, the only conclusion could be that court did not find them to be facts ; and that the case must be adjudicated on the special findings alone. *Tyre and Spring Works Co. v. Spaulding*, 285.

PRESCRIPTION. See **WATER AND WATER-COURSES**, 7, 8.

PRESUMPTION. See **ACTION**, 9. **AGENT**, 5. **INSURANCE**, 7. **MORTGAGE**, 20. **PARTNERSHIP**, 4. **SURETY**, 2, 3, 5. **TAX AND TAXATION**, 4. **TRUST AND TRUSTEE**, 12.

1. Where marriage in fact is shown, law raises strong presumption in favor of its legality, and burden of proof is on party contesting its validity. *Johnson v. Johnson*, 412.

2. So, although presumption in favor of validity of marriage in fact and innocence of contracting parties may conflict with that of continued life of former husband or wife not heard from for period less than seven years, yet if neither presumption is aided by proof of facts co-operating with it, the former prevails over latter. *Id.*

PROHIBITION.

1. Where inferior court has clearly no jurisdiction and defendant has objected at outset, and has no other remedy, he is entitled to writ as matter of right, and refusal to grant it, where all the proceedings appear of record, may be reviewed on error. *Smith v. Whitney*, 214.

2. *It seems*, that writ issues from law side of court with both common law and equity powers. *Id.*

PUBLIC POLICY. See **ATTORNEY**. **JUDICIAL SALE**, 1. **SHIPPING**, 1. **USURY**, 2.

PUBLIC POLICY.

1. A. deposited with stakeholder amount of wager on games between C. and D. When it was clear that A. would lose, he notified stakeholder not to pay money over, denouncing the match. At close, stakeholder paid over amount to winner. *Held*, that A. should recover his deposit. *McGrath v. Kennedy*, 351.

2. A condition of admission into aged person's home, besides payment of stipulated entrance fee, was that applicant should transfer to institution all his property or income of any kind. *Held*, neither *ultra vires*, nor against public policy. *Home v. Hammerbacker*, 478.

3. Where applicant declared in writing that he had no property other than entrance fee, and was admitted without conveyance of his property, and after his death it was discovered that at time of application he had some \$1200, *Held*, that institution was entitled to relief in equity against administrators of deceased. *Id.*

QUORUM. See MUNICIPAL CORPORATION, 3-6.

RAILROAD. See COMMON CARRIER, 9, 10, 14. CONSTITUTIONAL LAW, 6, 9, 10, 12, 14, 30. CONTRACT, 14. CORPORATION, 1, 27. DAMAGES, 7. HIGHWAYS, &c., 7. MASTER AND SERVANT, 5, 6, 11. MORTGAGE, 3, 7. NEGLIGENCE, 2, 11, 12, 14, 16, 21-25. TAX AND TAXATION, 8.

1. Railroad commissions: the decision of the Supreme Court of the United States, in *Farmers' Loan and Trust Co. v. Stone*, 10 U. S. Rep., stated and commented on. *Legal Notes*, 202.

2. Damages are not recoverable by railroad company against a town which has laid out ways over its tracks, for interference occasioned to its business by opening of the new ways, nor for any increased risks or expense in running its trains. *Id.*

3. While one railroad company may have the right to acquire the stock of another company, it has no right to use its controlling influence, thus acquired, with the directors of latter company, so as to sacrifice that company's interests. *State v. Brown*, 344.

4. Discrimination in rates of freight, made exclusively on the basis of a larger freightage, will not be sustained. *Schofield v. Rd.*, 79.

5. Where plaintiffs were frequent shippers and remedy at law would lead to multiplicity of suits, *held*, that the court would intervene by injunction, and that it was not a pre-requisite that plaintiffs should have first established their rights at law. *Id.*

6. Where railroad corporation is consolidated under statutes of several states, its acts of injurious discrimination committed or threatened in one of the states to shippers along the line of its road in that state, may be enjoined by the courts of that state. *Id.*

7. Where office safe kept at railroad depot, and used by agent as place of deposit for daily receipts and valuable papers, is useful and facilitates successful operation of road, it is not subject to levy under execution on judgment against road. *Rd. v. Shimmell*, 644, and note.

8. In assessing damages to be recovered by railroad company against a town for its land taken by locating town ways across its track, jury may consider, to ascertain present value, not only use railroad now makes of its located limits at the crossings, but what use it may reasonably be expected to make of same in near future. *Rd. v. Inhabitants of Dearing*, 549.

9. It is not an unconstitutional exercise of legislative power to require a railroad corporation to build and maintain highway crossings laid out over its tracks so far as said crossings are within its located limits, although law imposing such burden was enacted since railroad was built, the company being subject to general laws of state in existence when its charter was granted, and such as should thereafter be passed. *Id.*

10. In an action to recover damages for fire alleged to have been occasioned by negligent running of defendant's locomotives, plaintiff offered only indirect proof that fire was so caused; defendant then offered to prove custom of farmers to set fire to leaves at that season to improve pasturage, and that such fires had been started there annually long before defendant's road was built. *Held*, that the evidence was inadmissible. *Green Ridge Co. v. Brinkman*, 286.

RAILROAD.

11. Where railroad company is sued for damages resulting from a fire communicated by defendant's engine, proof that fire so originated creates presumption of negligence and *onus probandi* is on defendant to show the contrary. *Green Ridge Co. v. Brinkman*, 286.

12. The fact that the engine habitually scattered sparks to such an extent as to endanger combustible material along the line of road, is one from which the jury may find negligence on the part of defendant. *Id.*

13. Unless specially authorized by its charter or aided by some other legislative action, a railroad company cannot, by lease or other contract, turn over to another company, for a long time, its road and use of its franchises; nor can any other company, without similar authority, make contract to operate road, property and franchises of first corporation. Such contract is not among ordinary powers of railroad company, and is not to be inferred from usual grant of powers in railroad charter. *Thomas v. Rd.*, 101 U. S. 91, reaffirmed. *Penn Co. v. St. Louis Rd.*, 550.

14. Doctrine that acts may be done and property change hands, under void contracts fully executed, with which courts will not interfere, is sound, but relief in any such case must be based on invalidity of contract and not in aid of its enforcement. While plaintiff here might recover in appropriate action rental value of use of its road against lessee company, the other defendants who had received nothing, but had been paying out money under void contract cannot be compelled to pay more under same. *Id.*

RATIFICATION. See CORPORATION, 25. EVIDENCE, 11. MASTER AND SERVANT, 10. MUNICIPAL CORPORATION, 22. PARTNERSHIP, 6. SALE, 1.

RECEIVER. See CORPORATION, 16. EQUITY, 14. MORTGAGE, 16. PARTNERSHIP, 10, 11. TAX AND TAXATION, 6.

1. It is an inflexible rule that receiver should not be appointed except on notice to person whose property is to be divested, save in cases of grave emergency, demanding immediate interference of court for prevention of irreparable injury. *Meyers v. Coiner*, 677.

2. Compensation of, in all cases not attended with peculiar circumstances requiring augmentation, should be regulated by analogy to commissions allowed guardians and trustees for similar services. Order making allowance for compensation should be definite. *Tome v. King*, 351.

3. Where receivers are appointed solely at instance and for benefit of second mortgage bondholders, and trustees were appointed to sell exclusively for benefit of same parties, first mortgage bondholder cannot be assessed for commissions and expenses of receivers and trustees. *Id.*

4. If fund in court be insufficient to compensate and indemnify receivers, parties at whose instance they were put upon the property, should be required to provide the means of payment. *Id.*

5. Recovery of judgment against partners after appointment of receiver to take charge of firm assets for benefit of creditors generally, creates no lien against property of firm in hands of receiver; such property being in custody of the law is not subject to execution or garnishment. *Jackson v. Lahee*, 286.

6. A receiver was appointed on bill filed by one partner against the other for settlement of partnership accounts and payment of creditors of firm, which was insolvent, and court had ordered notice to be given to all creditors to prove their debts before the master. It was held, that one of creditors by recovery of judgment against firm during pendency of bill and the filing of creditors' bill on same day that notice to creditors was ordered, did not acquire any lien on assets in receiver's hands or right to be preferred over other creditors—the more especially when such creditor proved his claim before the master and shared in distribution of funds in his hands. *Id.*

7. Plaintiffs (4) and defendants (13) are members of unincorporated joint-stock company, property of which at commencement of suit consisted of building, small amount of furniture and \$82 in money, in all of value of about \$1100; stock was divided into \$10 shares, of which plaintiffs owned twelve and defendants the balance; building was erected for use of Patrons of Husbandsry, of which all defendants are and plaintiffs had been members. *Held*,

RECEIVER.

that equity does not require appointment of receiver to sell property and divide proceeds among members of company. *Hinkley v. Blaken*, 616.

8. ACTIONS BY AND AGAINST RECEIVERS, 289.

REFORMATION. See **EQUITY**, 22.**RELEASE.** See **EQUITY**, 21.**RELIGIOUS SOCIETY.** See **TRUST AND TRUSTEE**, 2.**REMOVAL OF CAUSES.** See **HABEAS CORPUS**, 1.

1. Colorable assignment to prevent removal will not authorize United States courts to take jurisdiction. *Oakley v. Goodnow*, 478.

2. If it appears that some title, right, privilege or immunity on which recovery depends, will be defeated by one construction of constitution or law of United States, or sustained by opposite construction, case will be one arising under the constitution or laws of the United States, within meaning of Act of March 3d 1875; otherwise not. *Starin v. New York*, 79.

3. Bill filed by judgment creditor to marshal liens and obtain sale of debtor's property free of encumbrance, to pay his judgment after satisfying prior claims and in meantime to have receiver appointed, raises but a single, indivisible cause of action, though each of lien holders may have a separate defence. *Fidelity Co. v. Huntington*, 352.

4. Answer of defendant to complaint, which answer was signed only by her attorney and was not under oath, stated that defendant was citizen of New York. *Held*, that she was not thereby estopped from subsequently showing on petition for removal, that she was citizen of Massachusetts, it having been shown how mistake arose, and defendant having promptly denied erroneous statement as soon as it was brought to her attention. *Cerson v. Hyatt*, 478.

5. Mere filing of petition for removal of suit that is not removable, does not work a transfer. If state court proceeds after petition for removal, it does so at risk of having its final judgment reversed, if record shows that when petition was filed, court ought to have given up its jurisdiction. *Stone v. State*, 351.

6. No statute authorizes removal of suit between a state and citizens, on account of citizenship. *Id.*

7. Where money sued for was received by defendants as partners, all the partners must unite in petition for removal. *Id.*

8. Plaintiffs having removed action of ejectment against a tenant on ground of citizenship, the landlords who were of same citizenship as plaintiffs, were let in as defendants. *Held*, that cause was thereupon improperly remanded. *Phelps v. Oakes*, 352.

9. State statute provided that proceedings for condemnation of land for railway purposes should be instituted in probate court of proper county; that necessity for taking lands, and their value, should be determined by commissioners, or jury selected by such court, and that such proceedings should only be subject to review by the Supreme Court. Under this statute railroad company petitioned probate court for condemnation of defendant's lands. Defendant answered petition, and demanded removal to federal court. *Held*, that case was removable directly from probate court. *Railroad Co. v. Copper Co.*, 177, and *note*.

10. It is no objection to jurisdiction of federal court in such cases, that it involves exercise of right of eminent domain. *Id.*

RESCISSION. See **SALE**, 1, 2.**RESERVATION.** See **DEED**, 4, 5.**RESIDENCE.** See **DOMICILE**.**REVOCATION.** See **CONTRACT**, 10.**SALE.** See **AGENT**, 1, 2, 4. **BAILMENT**, 1-3. **CONTRACT**, 6, 7. **DAMAGES**, 10, 11. **DEBTOR AND CREDITOR**, 1, 4, 5, 7, 8. **FIXTURES**. **MORTGAGE**, 13

1. If vendor of goods after being advised of fraud of purchaser in misrep-

SALE.

representing his ability to pay, accepts further security he cannot afterwards rescind. *Bridgeford v. Adams*, 214.

2. One who claims right to rescind sale must proceed within reasonable time in making inquiries. *Id.*

3. The general rule in this country is, that where there is a sale of chattels in the vendor's possession at the time, at a fair price, there is always an implied warranty of title, unless the facts and circumstances are such as to warrant a different conclusion. *Edgerton v. Michels*, 260, and note.

4. One intrusted with the possession, management, control and disposal of goods to be sold, is an agent and not a broker, and is liable upon an implied warranty of title. *Id.*

5. Under contract for sale of "500 tons No. 1 Shotts' (Scotch) pig iron, at \$26 per ton, cash, in bond at New Orleans; shipment from Glasgow as soon as possible, delivery and sale subject to ocean risks,"—shipment from Glasgow is a material part of contract. *Filley v. Pope*, 80.

6. Where vendors rescind a sale on the ground of fraud, and bring replevin, under which a portion of the goods is seized and returned, they cannot recover for the balance against the assigned estate of the vendee upon a claim for goods sold and delivered, but must bring an action on the tort. *Farwell v. Meyers*, 243, and note.

7. T. agreed to put in for S. an elevator "warranted satisfactory in every respect." After trying elevator, S. refused to accept it. *Held*, that provided he acted in good faith, S. was sole judge whether elevator was satisfactory. *Singerly v. Thayer*, 14, and note.

8. Where statute provides that no condition attached to sale of personal property shall be valid as against creditors of vendee, or subsequent purchaser from him in good faith, unless in writing, acknowledged and recorded, parol condition that title shall not pass until payment of price, is valid against creditors of vendee, who, at time of sale had notice of condition. *Coover v. Johnson*, 310, and note.

9. Innkeeper sent following order to wholesale liquor dealer. "Please send by first express, a half barrel Bourbon whiskey and two baskets of Piper wine. What is used I will account for and ship rest back to you. I want it for the commercial travellers who will be here Friday to dinner." *Held*, that title passed on delivery to innkeeper, so that liquors could be attached by his creditors. *Hotchkiss v. Higgins*, 79.

10. Four hundred and ten shares of stock of a newly incorporated company were sold at thirty cents on the dollar. The plaintiff sold five shares, thus paid for, to the defendant at par, representing that all stockholders had paid par for their stock. *Held*, that this was a misrepresentation of a material fact by which the defendant was misled as to the company's assets. *Coolidge v. Goddard*, 151.

11. Flour was ordered by brokers for Dub & Co., with this direction: "Ship as soon as you can, forty-five days draft, to B. Dub & Co." Dub & Co. assigned it to M., without returning draft signed, it being sold with bill of lading and invoice stating terms as forty-five days acceptance. *Held*, the giving of acceptance was condition precedent to acquisition of title by B. Dub & Co., and sellers of flour might maintain trover therefor against M. *Mathewson v. Belmont Co.*, 550.

12. Agreement in writing to sell personal property, title to which is reserved by seller until purchase-money is paid by buyer, is a conditional sale and does not vest title in buyer until purchase-money is paid, notwithstanding possession of property is given to purchaser at time of making agreement; and such an agreement is valid against subsequent creditors and bona fide purchasers for value without notice. *Printing Press Co. v. Walker*, 678.

13. Respondent, a dealer in New York, shipped intoxicating liquor to parties in Vermont by express, C. O. D. The liquor, intended for an unlawful use, was seized without warrant while in possession of express company and confiscated before delivery and payment. *Held* (a), that seizure was lawful; (b), that contract was inchoate while goods were in transit; that payment was condition precedent, and there was no surrender of legal title; that express

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company was agent of consignor, and that he was legally convicted under indictment charging him with keeping liquor for unlawful purpose. *State v. O'Neil*, 677.

14. When in such case the liquor has been delivered by express company to consignee in Vermont and paid for, the sale is in that state and vendor is liable to conviction for an illegal sale. *Id.*

SEAL. See **AGENT**, 11. **CORPORATION**, 15. **MORTGAGE**, 28.

SET-OFF. See **TRUST AND TRUSTEE**, 5. **VENDOR AND VENDEE**, 2.

1. In pleading set-off defendant, in order to recover, is required to prove same facts as if he had brought suit on his demand. *Ellis v. Cothran*, 796.

2. Defendant cannot recover on matter by way of set-off, when his claim was not due at time plaintiff brought suit; nor can he, after suit brought, purchase a demand against plaintiff and set it up as a defence. *Id.*

3. If factor sell in his own name, as owner, and does not disclose his principal, acting ostensibly as real owner, although principal may afterwards bring his action against purchaser on the contract, yet latter, if he bona fide dealt with factor as owner, will be entitled to set off any claim he may have against factor in answer to demand of principal. *Rubin v. Gunn*, 550.

4. It is not essential to proper allowance of legal demand, as set off in equity against a judgment at law, on ground of insolvency of party in whose favor judgment was recovered, that insolvency should have occurred subsequent to judgment; and although cross-demand might have been set off in action at law in which judgment was recovered, that was permissive, not compulsory on defendant. *G. & S.W. Rd. v. Eanor*, 678.

SHELLEY'S CASE, RULE IN. See **LIFE TENANT**, 2.

SHIPPING.

1. Whether contract between two of several part owners of a vessel that each shall sail her as master alternate years, is void as against public policy—*quare*. *Rogers v. Sheerer*, 80.

2. Assuming such contract to be valid, true construction of it is, that each shall sail the vessel alternate years, only so long as he properly performs the duties of master. *Id.*

3. Action for money had and received cannot be maintained by part owner (not ship's husband) for his share of freight money, against master who collected and remitted same to ship's husband after receiving written notice from such part owner to remit his share to him. *Patten v. Percy*, 80.

4. Tenants in common must join in an action to recover earnings of vessel unless there is an excuse for severance of claim. Bankruptcy of one owner is not valid excuse, his assignee should be joined, or if assignee has not been appointed, suit should be commenced in names of bankrupt and co-owners until assignee comes in. *Stinson v. Fernald*, 151.

SLANDER AND LIBEL. See **INJUNCTION**, 1.

1. Reply of employer to discharged employee, in answer to question as to why latter was discharged, is privileged, and burden is upon employee to show existence of malice. *Beeler v. Jackson*, 479.

2. It is sufficient if complaint states facts sufficient to show legal wrong for which law will afford redress. *McElwee v. Blackwell*, 479.

3. In action for slander of title to trade-mark, where injury is not so much the defamatory words, but was occasioned by positive acts and threats, by which customers of plaintiff were deterred from trading with him, *held*, error to non-suit plaintiff, because complaint did not set out the actionable words. *Id.*

4. Action for libel cannot be sustained for false charges of crime in an affidavit for warrant made before magistrate having jurisdiction of alleged offence, though deponent may be prosecuted for perjury; but if made maliciously before a court without jurisdiction such action will be sustained. *Francis v. Wood*, 282.

5. The defendant falsely and maliciously spoke of plaintiff the following words, by reason of which he lost his position as clerk and assistant weigh-

SLANDER AND LIBEL.

master: "He has caused the ruin and downfall of my clerk!" "Will (meaning plaintiff) has been the ruination of my clerk; I do not want him (meaning plaintiff) to have anything to do with my business;" meaning that plaintiff should not weigh any goods consigned to defendant. *Held*, that the words thus spoken were actionable. *Wilson v. Cottman*, 796.

6. When some specific damage is caused by words falsely and maliciously spoken, they may become actionable, when otherwise the law would give no redress against the person speaking them. *Id.*

7. At a meeting of a body of citizens of Philadelphia styled the "Committee of One Hundred," assembled for the purpose of considering the merits of candidates for public office, a letter reflecting severely on character of a judge who was a candidate for re-election, by statements subsequently acknowledged to be wholly untrue, was, by order of chairman, read by secretary, and, reporters being present, appeared at length in daily papers. *Held*, that the communication was privileged, and legal malice not inferable therefrom; that being based on probable cause, it was proper for discussion at such meeting; and that court below was justified, in absence of proof of actual malice, in entering nonsuit in action for libel brought against chairman of meeting. *Briggs v. Garrett*, 493, and note.

SPECIFIC PERFORMANCE. See EQUITY, 17-19. INSURANCE, 24.

Mere fact that contract stipulates for liquidated damages in case of failure to perform, does not prevent court of equity from decreeing specific performance; it is only where contract is alternative—the performance of certain acts or payment of certain money in lieu thereof—that equity will not decree specific performance. *Lyman v. Gedney*, 286.

STARE DECISIS. THE PRINCIPLE OF STARE DECISIS, 745.

STATUTE. See CONSTITUTIONAL LAW, 34, 38, 39. OFFICER, 7.

1. General repealing clause in unconstitutional statute does not affect previous laws. *Wilke v. Barnes*, 352.

2. Where, by act submitting question to voters of the several election districts of Caroline county, whether or not spirituous or fermented liquors should be sold therein, majority of voters in Third Election District was against the sale, and by subsequent act new election district was established out of said third district, the prohibition will continue. *Higgins v. State*, 479.

STOCK. See ATTACHMENT, 2-5, 15. BANKRUPTCY, 4. CONTRACT, 10, 23. CORPORATION, 1, 6-8. GIFT, 4. MORTGAGE, 10.

STREET. See DEED, 5. HIGHWAYS, &C., 3, 4-7.

SUBROGATION. See COMMON CARRIER, 20. EQUITY, 23. MORTGAGE, 18, 24, 29.

SUNDAY. See MUNICIPAL CORPORATION, 18.

1. Carrying on of one's ordinary business on Sunday is an indictable offence at common law, and also under statutes of Tennessee, if conducted so openly as to attract public observation. *Parker v. State*, 722, and note.

2. It is no defence that accused conscientiously observes the "seventh" rather than the "first" day of the week. *Id.*

SURETY. See ATTACHMENT, 14. BILLS AND NOTES, 7. DECEDENTS' ESTATES, 1. EXECUTORS AND ADMINISTRATORS, 5. GUARANTY. LIMITATIONS, STATUTE OF, 7, 8. LUNATIC, 5. MORTGAGE, 24, 25.

1. On guardian's bond, concluded by final settlement of guardian's accounts in probate court, in absence of fraud and collusion. *Braiden v. Mercer*, 479.

2. Where creditor receives from principal debtor payment of interest in advance on past due note, agreement to give time is necessarily implied, and creditor is debarred suing meantime on note and surety discharged—unless creditor can show mistake or, possibly, agreement that right of suit should not be suspended. *Gardner v. Gardner*, 412.

3. Whether sealed note which matured in 1860 and was credited with pay-

SURETY.

ments by principal debtor down to 1865 should be presumed paid as to sureties in 1884, raised but not considered. *Gardner v. Gardner*, 412.

4. Security on bond of defaulting county treasurer against whom an execution has issued for funds belonging to county in hands of treasurer, cannot take homestead, which will exempt his property from debt incurred by reason of his obligation on the bond. *McWatty v. Jefferson Co.*, 551.

5. Presumption would be that funds in hands of treasurer arose, at least in part, from taxes, and no evidence was offered by surety in this case that any part of fund came from other sources, though treasurer was bound to keep record of all funds received by him and source from which they came. *Id.*

6. Surety of a trustee cannot maintain bill in equity to require his principal to give additional securities on his bond given to secure *cestuis que trustent*, or counter security, and on failure to give such security have him removed. *Ridge-way v. Potter*, 287.

7. The principal is under no legal duty to a surety to keep his co-sureties in equal solvency as they were when they first became such, or to keep any co-sureties to share in the liability. *Id.*

8. Courts of equity, in relief of sureties under apprehension of loss have gone to extent of allowing surety, after debt has become due, to file a bill to compel principal to discharge it; and a surety, when debt has become due, may compel creditor to sue for and collect it from principal. *Id.*

9. On bill by a surety on bond of trustee to compel him to render an account to the court where the *cestuis que trustent* are not made parties, it is not error for court to refuse to state the account, as it would not conclude them. *Id.*

TAX AND TAXATION. See CONSTITUTIONAL LAW, 7, 11, 27, 30. LICENSE,

1. MANDAMUS, 5, 6. MUNICIPAL CORPORATION, 16. PAYMENT, 1, 2. UNITED STATES, 2. USURY, 10.

1. Trustee resident in another state, who holds as trustee no property in Rhode Island, is not liable to taxation in town where his *cestui* resides in that state. *Anthony v. Caswell*, 616.

2. Where property is collected from one or more points, by any means of transportation, and is awaiting the necessary preparation and facilities for further transportation, it is not liable to taxation. *Board v. Standard Oil Co.*, 287.

3. But where property is collected, even at point of final shipment, to await the rise of markets or from any other cause having no relation to preparation for, or exigencies of transportation, it will be held to have acquired a situs making it subject to taxation. *Id.*

4. Exemption from taxation is a franchise, a surrender of which may be presumed from long acquiescence in actual taxation, which government may take advantage of, though same period of non-user would be ground of forfeiture in direct proceeding by state to revoke franchise. *State of New Jersey v. Wright*, 412.

5. Goods intended for export from state of their production to another state are subject to taxation in the former, until they have been started upon such transportation in a continuous route; the carrying of them to the depot where the journey is to commence is no part of that journey. *Coe v. Errol*, 287.

6. Where proper officers of county or town have levied a tax for satisfaction of judgments against it, and no one can be found to accept the office of collector, a court of equity has no jurisdiction to fill that office or to appoint a receiver to perform its functions. *Thompson v. Allen Co.*, 152.

7. An assessment of different kinds of property, as a unit, which includes property not legally assessable, and in which part of tax illegally assessed is not separable from other part, is invalid and will not support an action for recovery of entire tax so levied. *Santa Clara Co. v. Rd.*, 551.

8. The fences erected upon line of railroad between its roadway and land of coterminous proprietors cannot be assessed under head of roadway. *Id.*

9. Buildings and other property owned by municipal corporations and appropriated to public uses, are but the means used for municipal purposes and are exempt from taxation not by express statutory prohibition, but by necessary implication. *Camden v. Camden*, 151.

TAX AND TAXATION.

10. A village corporation was authorized by its charter to raise money to defray expenses of police force, &c., and also to erect a hall. The building thus erected contained a public hall, police court room, &c., and when not in use for purposes of the corporation, the hall and other rooms were let for hire and the money received therefrom was used towards paying expenses of the corporation. *Held*, that building and lot were not liable to taxation by the town in which they were situated. *Camden v. Camden*, 151.

TELEGRAPH. See **CONTRACT**, 4. **EVIDENCE**, 4, 5.

1. Prescribing a penalty against telegraph companies for failing to transmit a message is valid and constitutional, whether message is to a point within or without limits of the state. *Western Union Tel. Co. v. Ferris*, 387.

2. Where sender of message proves unreasonable delay, the burden of explaining it is on the company. *Id.*

3. Delay of several hours in transmitting message that could be sent in fifteen minutes shows want of diligence. *Id.*

4. Where business of office is such that one operator cannot receive messages with reasonable promptness, it is duty of company to supply required assistance. *Id.*

5. The law enjoins on telegraph companies prompt and skilful performance of their undertaking and for failure to transmit or deliver a telegram to person to whom it is addressed within a reasonable time, such company is liable to person injured whether he be the sender or person to whom it was addressed. *W. U. Tel. Co. v. Hyer*, 678.

6. In such case it is no defence that sender did not inform operator of importance of telegram, when it is not shown that such information would have changed method of transmission, time of delivery, or price demanded therefor. *Id.*

7. Nor is it any defence that message is in cipher, provided it is plainly written, and words are in letters of English alphabet. *Id.*

8. A verbal contract that plaintiff should labor for manufacturer at \$2.25 per day, commencing Sept. 1st, but for no stipulated period, is defeasible at will of either party, and telegraph company is liable for nominal damages only, in not delivering telegram to plaintiff, seasonably notifying him of terms of contract, whereby he lost all benefit from it. *Merrill v. W. U. Tel. Co.*, 551.

TELEPHONE.

1. Telephone company is common carrier, in same sense as telegraph company. Its instruments and appliances are devoted to public use and subject to legislative control; so that state legislature may prescribe maximum charges. *Hockett v. State*, 317, and note.

2. That article is manufactured under United States patent does not prevent a state, in exercise of its police powers, from regulating its use. *Id.*

3. The word "telephone" covers the entire system or apparatus. *Id.*

TENANTS BY ENTIRETIES. See **LIFE TENANT**.**TENANTS IN COMMON.** See **PARTITION**. 1. **SHIPPING**, 4.

1. One tenant in common may rightfully insist that the other shall contribute his proportionate share for preservation of joint property, but not that he shall enter on new investments, to be paid for from the joint property, or out of other funds belonging to him, against his judgment and inclination. *Field v. Leiter*, 797.

2. Where one of two tenants in common of a tract of land, which had been sold for taxes, instead of redeeming directly from the sale, made an agreement with the holder of the certificate of purchase, that latter should take out tax deed thereon, and then convey premises to former, which was done, it was *held*, that transaction amounted to but a redemption which ensured to benefit of both tenants in common, and court of equity would compel one taking conveyance of tax title to convey to other one individual half of tax title on payment half cost thereof. *Lomax v. Gindels*, 798.

TORT. See **ATTACHMENT**, 1. **UNITED STATES COURTS**, 4.

TRADEMARK. See **SLANDER**, 3.

1. The words "health preserving" preceding the word "corset" in the name adopted by manufacturer of corsets under letters patent, but describe a quality of the corset and cannot, therefore, be employed as a trademark. *Ball v. Siegel*, 678.

2. Even if a party has a trade-mark in the name of "Balls" and picture, words and form of lettering on labels pasted on his boxes containing corsets, there is no infringement when a different name is used by another manufacturer with a picture, words and form of lettering so totally unlike those of former that no one can reasonably mistake one for the other. *Id.*

3. If the words of alleged infringing device are such as would be likely to mislead persons in ordinary course of purchasing the goods, then the injured party is entitled to equitable protection if he takes reasonable measures to assert his rights; but a court of equity is not bound to interfere when ordinary attention will enable purchasers to discriminate between the trade-marks used by different parties. *Id.*

4. Manufacturer has right to use his own name as mark upon his goods, although it be same name with that of another manufacturer of same goods, who makes the name a part of his own trade-mark, where there is no false representation. *Rogers v. Rogers*, 744.

TRESPASS. See **HIGHWAYS, &c.**, 1, 2. **NEGLIGENCE**, 11, 12, 16. **OFFICER**, 2.

In trespass *quare clausum* for felling defendant's trees across fence line and covering plaintiff's land with brush, measure of damages is not confined to expense of removing brush, nor to value of land encumbered. *Hutchinson v. Parker*, 798.

TRIAL. See **CRIMINAL LAW**, 12.

Where plaintiff in action for personal injuries alleges that they are of permanent nature, defendant is entitled, as matter of right, to have opinion of surgeon on his condition, based upon personal examination; and the court should compel plaintiff to submit to such examination. But where evidence of experts is already abundant, court must exercise its sound discretion in compelling or refusing such examination, and its discretion is subject to review in case of abuse. *Sibley v. Smith*, 551.

TROVER. See **SALE**, 11.

1. To constitute conversion of chattels there must be some exercise of dominion over the property in repudiation of or inconsistent with owner's rights. *Evans v. Mason*, 798.

2. In action of trover for horse hired by defendant to go to and from a place named without stopping, his mere delay in returning is not sufficient evidence of a conversion. *Id.*

TRUST AND TRUSTEE. See **BANK**, 6. **CORPORATION**, 2, 3, 22, 38. **DEBTOR AND CREDITOR**, 9. **EQUITY**, 14-16. **FRAUDS, STATUTE OF**, 4, 5. **GIFT**, 4. **INSURANCE**, 22. **JUDICIAL SALE**, 1, 2. **LIMITATIONS, STATUTE OF**, 11. **MORTGAGE**, 19. **SURETY**, 6, 9. **TAX AND TAXATION**, 1. **WILL**, 25.

1. An interest in land does not pass, by resulting trust, from owner to one whose money is expended in improving the land. *Bodwell v. Nutter*, 413.

2. When land was conveyed in trust for erection of church and academy for benefit of a Lutheran congregation, the church council could not transfer to others not Lutherans or to town council any portion of land for establishment of academy or school. *Busbee v. Mitchell*, 413.

3. Where trustee of fund held for benefit of life tenant with remainder over purchases bonds at premium, he may retain out of interest such sums annually as will restore to fund, at maturity of bonds, exactly what was taken therefrom at time of purchase. *Trust Co. v. Eaton*, 162.

4. Right of trustee to retain such sums out of income may be adjudicated by probate court upon settlement of his annual account. *Id.*

5. Where trustee holds note belonging to trust estate and receives in payment thereof a credit allowed to himself on his individual indebtedness, the payment

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is not, on part of maker of note, a good payment to trust estate although trustee is solvent at time of such payment. *Maynard v. Cleveland*, 288.

6. Where party receives money of another to be invested in purchase of land and pays out same, with other money of his own, in a purchase, taking deed in his own name, he will hold land so acquired in trust for person whose money he has so used in proportion it bears to entire consideration paid. *Springer v. Springer*, 413.

7. In such case holder of legal title cannot set up as defence to bill to enforce resulting trust, laches of defendant for time during which he recognised his equitable rights. Such defence will avail him only from time he sets up adverse claim. *Id.*

8. Where resulting trust is sought to be established, after lapse of fifteen years and death of many people having knowledge of facts, on ground that complainant's money was used in paying for land, and that his wife by fraud and conspiracy had conveyance made to her imbecile son by former marriage, it is incumbent on plaintiff to establish these facts by very clear and satisfactory evidence or he can have no relief. *Hencke v. Floring*, 413.

9. The title to house and lot was taken in 1852, in name of R., consideration being paid by D., who with his family continuously occupied and paid taxes on said premises until his death, without accounting for rents to R., or being called on by him to do so. R., at request of D., afterwards conveyed premises to C., who was D.'s daughter by a former wife. *Held*, that D. has a resulting trust in the premises, and that his wife was entitled to dower therein. *Mershon v. Duer*, 152.

10. Where husband pays for land which is conveyed to wife, the presumption is that a gift was intended, and a resulting trust will not arise in his favor. *Read v. Huff*, 150.

11. The proof which in such cases shall overcome the presumption of gift to the wife must be of facts antecedent to, contemporaneous with, or immediately following the purchase, so as to be in fact part of the same transaction, and must be equally explicit with the proof required to establish a resulting trust. *Id.*

12. A statute provided that "express trusts may be created" * * * "for the beneficial interest of any person or persons, when such trust is fully expressed and clearly defined upon the face of the instrument creating it, subject to the limitations as to time prescribed in this title." *Held*, that letters, statements, and agreements which passed between plaintiff and defendant, as evidence in this case, are sufficient to establish express trust within meaning of statute. Objection that individual interests of beneficiaries are not stated is met by rule that where conveyance of land is made to two or more persons and instrument is silent as to interest each is to take, presumption will be that their interests are equal. *Loring v. Palmer*, 552.

13. INVESTMENT OF TRUST FUNDS, 217.

TURNPIKE COMPANY. See CORPORATION, 4, 5.

ULTRA VIRES. See RAILROAD, 13.

UNDUE INFLUENCE. See ACTION, 2.

UNITED STATES. See CONSTITUTIONAL LAW, 4. ERRORS AND APPEALS, 10. MINES AND MINING, 1-4.

1. Plaintiffs wrote two letters to Chief of Bureau of Steam Engineering, U. S. Navy Department, offering to supply certain boilers at specified price, to which written replies were received stating that by direction of Secretary of Navy the offers were accepted, and that specifications and drawings would be furnished as soon as prepared. *Held*, that these letters did not constitute contract in writing and signed by contracting parties within meaning of Rev. Stat., sects. 3744-3747, and sects. 512-515; but were nothing more than preliminary memoranda. *Iron Co. v. United States*, 479.

2. Sect. 2504, schedule M., p. 480 (2d ed.), Rev. Stat., imposes tax fifty per cent. *ad valorem* on proprietary medicines, and same schedule and section, p. 477, makes duty on calcined magnesia twelve cents per pound. A certain firm put up calcined magnesia in bottles with their name blown thereon, wrapped in circular which claimed peculiar excellence for their preparation, cautioning

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purchasers against imitations thereof, and calling attention to "trade-mark" stamped thereon. The process used by firm in calcining magnesia was not a secret one, but the preparation differed from ordinary calcined magnesia in that grit was got rid of, and it had peculiar market value by reason of nicety with which it was prepared. *Held*, that it was subject to tax as a proprietary medicine. *Ferguson v. Arthur*, 406.

UNITED STATES COURTS. See BANKRUPTCY, 6. CONSTITUTIONAL LAW, 42-44, 46. ERRORS AND APPEALS, 2, 3, 7, 9.

1. Party who has moved from one state into another cannot sue in federal court as non-resident, after showing by his acts and declarations before litigation commenced, an intention of becoming citizen in new place of abode. *Winn v. Gilmer*, 706, and note.

2. Exclusive jurisdiction conferred on United States District Courts by 9th sect. of the Act of Sept. 24th 1789, of all suits for penalties and forfeitures under the customs laws, is not taken away by grant of jurisdiction to Circuit Court in 1st sect. of Act of March 3d 1875. *United States v. Mooney*, 215.

3. In action of trespass for seizing personal property *colore officii* with circumstances of aggravation and averment of special damage brought in Circuit Court United States, under Act 3d March 1875, it is error for court to dismiss suit on the ground that it did not "really and substantially" involve a controversy within its jurisdiction; where the conclusion is based on the opinion that a verdict for \$500 damages would be set aside as excessive. *Berry v. Edmunds*, 288.

4. The action being for tort it was for the jury to determine the damages, and in view of the enormity of the offence they might have been made punitive; such a verdict should not be set aside unless the jury have committed some gross error or acted under some improper influence or totally mistaken rules by which damages are regulated. *Id.*

5. Where it does not appear as matter of law from the nature of case as stated in pleadings that there could not legally be a judgment recovered for amount necessary to give jurisdiction, the court, in order to dismiss suit for want of jurisdiction must find as a matter of fact upon evidence legally sufficient that amount of damages stated in the declaration was colorable, and was so laid for the purpose of creating a case. *Id.*

6. The discretion given by sect. 5, Act March 3d 1875, is judicial, proceeding upon ascertained facts, according to rules of law, and subject to review for apparent errors. *Id.*

USURY. See CONFLICT OF LAWS, 3.

1. Agent for loaning money may take reasonable commission from borrower, even with knowledge of lender, without transaction being thereby made usurious, though full lawful interest is reserved to lender. *Landis v. Saxton*, 616.

2. Contract by executor for bonus from borrower of money of trust estate is illegal and will not be enforced. *Id.*

3. By terms of building association mortgage, weekly payments on loan were required, which amounted to more than legal rate of interest. The mortgage indicated that such payments were for interest, expenses, &c. *Held*, usurious. *Waverly Assn. v. Buck*, 480.

4. Where maker of promissory note payable *in futuro*, with ten per cent. interest from date, omitting the words "until paid," pays that rate of interest after maturity of note, he cannot recover excess paid over six per cent. accruing after maturity. *Rector v. Collins*, 522.

5. It is not usury to add interest on several notes to principal, and then add to sum interest on it at ten per cent. per annum for one year, and then take new note for this last sum payable one year after date, with interest at ten per cent. per annum after maturity, in payment of old notes. *Grider v. Drier*, 552.

6. It is not usury for one to sell property on credit for higher price than for cash, with legal interest added; but if sale be made on cash estimate, and time given to pay same, and an amount is assumed to be paid greater than cash price, with legal interest, that is usurious. *Id.*

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7. Plaintiff will not be relieved in equity from usurious contract except on condition he pays principal and legal interest. *Grider v. Driven*, 552.

8. Although it will be presumed in many cases, in absence of contrary showing, that laws of other states are same as our own, the presumption will not be indulged where our laws impose penalty or forfeiture, as in case of usury. *Id.*

9. Parol evidence is admissible to show a different consideration from that expressed in notes and conveyances. Such evidence is also admissible where usury is pleaded regardless of the form the transaction may have in the writings executed by the parties. *Kidder v. Vandersloot*, 152.

10. A. borrowed \$2500 on several years' time, and to secure its payment with interest, conveyed to the lender eighty acres of land, taking back a written contract for a reconveyance on payment of principal and ten per cent. interest annually, that rate being the highest then allowed by law, with \$20 yearly for taxes, making \$270 annually, and the proof showed that only \$250 was in fact paid as interest, and that, on payment of that sum, and producing tax receipt of such year he was credited with \$270. It was held, the contract was not usurious, and that the \$20 was but a guaranty for the payment of the taxes, which were chargeable against the mortgage by reason of the legal title being in him. *Id.*

VENDOR AND VENDEE. See **CONTRACT**, 9. **COVENANT**, 2. **EQUITY**, 17.

FIXTURES, 1. **FRAUDS**, **STATUTE OF**, 3. **LIEN**, 1, 2.

1. Where land is sold at fixed price per acre, and vendor fraudulently misrepresents the number of acres, vendee is entitled to abatement in price, although deed contains the phrase "more or less." *Tyler v. Anderson*, 570, and note.

2. If vendor of land remaining in possession, buys in outstanding incumbrance, he will not be permitted to set up adverse title under it. Purchase enures to benefit of vendor's title and vendee can only abate purchase-money, or in case he has paid this, recover amount expended by action on covenant broken or other proper remedy. *Bush v. Adams*, 552.

3. The principle governing courts of equity in enforcement of liens is implied agreement held to exist between vendor and vendee that former shall hold lien on lands sold for purchase-money, on ground that person who has estate ought not, in conscience, as between them, to keep it and not pay purchase-money; but if vendor takes collateral and independent security for purchase-money, he thereby waives all right to vendor's lien. *Beal v. Harrington*, 679.

4. A person purchased land, for which he agreed to give certain goods and convey town lots valued at \$1000, and had land so purchased conveyed to his sons in trust for himself, they paying nothing, and delivered the goods, but was unable to convey the lots for want of title thereto. The sons afterwards, at father's request, conveyed land to third person, who paid nothing therefor, but held title for the father. Held, that vendor had lien on lands conveyed by him to extent of \$1000—the unpaid purchase-money—which he could enforce against the sons and their voluntary grantees. *Id.*

5. Where purchaser of land entered into possession under agreement that purchase-money was not to be paid unless vendor should, within three years, make him a warranty deed conveying a perfect title, and in case of failure so to do, purchaser was to remain in possession for three years and pay reasonable rent for time he could hold peaceable possession; and before expiration of three years he acquired title from other parties, it was held, that there was nothing in relation of parties, under original contract or otherwise, that prevented purchaser from yielding to superior title, purchasing same to secure his peace and asserting it against his vendor. *Green v. Deitrich*, 413.

VERDICT. See **CRIMINAL LAW**, 13, 14.

WAGER. See **PUBLIC POLICY**, 1.

WAGES. See **EXEMPTION**, 9, 10.

WAIVER. See **ERRORS AND APPEALS**, 8. **EVIDENCE**, 1. **EXEMPTION**, 9, 10. **VENDOR AND VENDEE**, 3.

WARRANTY. See **AGENT**, 5, 6. **BAILMENT**, 1. **CONTRACT**, 21. **INSURANCE**, 14. **SALE**, 3, 7.

WATERS AND WATER-COURSES. See **DAMAGES**, 8. **DEED**, 10, 11. **EQUITY**, 13.

1. If owner of land on running stream so construct embankments to protect his land from current, that man of ordinary prudence would reasonably anticipate damage to owners of other lands in case of flood, he is liable for such damage. *Crawford v. Rambo*, 480.

2. Where all that can be inferred from what complainant states in his bill, is, that in case of heavy freshet, stream will, if embankment remains, overflow portion of his land and destroy the crops, if any thereon, case for injunction to restrain defendant from maintaining embankment, is not made out; the few acres liable to such occasional overflow being part of a farm of more than 100 acres. *Blaine v. Brady*, 480.

3. Where one deliberately and without compulsion, selects a particular portion of a floatable stream for storage of logs, and thereby prevents another from entering such common highway with drive of logs from tributary stream, he is liable for damage occasioned thereby. *McPheters v. Log Driving Co.*, 799.

4. Wages and board of men while waiting for a reasonable time would be an element of damages; so, too, would expense moving one crew out and another in, as well as increased cost of drive next season and interest on contract price for making drive during time payment was delayed, because of inability to complete drive owing to such obstruction. *Id.*

5. Loss of supplies left in woods for use when completing drive and destroyed by wild beasts, too remote to constitute element of damage. *Id.*

6. An easement originating from water supplied by spring not situated on land belonging to grantor of plaintiff's premises, will not pass as appurtenant to estate conveyed, unless it has become attached to same; but if it has become appurtenant to it either by express or implied grant or by prescription, a conveyance of that estate will carry such easement, whether mentioned in deed or not, although it may not be necessary to employment of estate by grantee. *Doddy v. Dunning*, 799.

7. There may be such adverse and exclusive use of water flowing through an aqueduct for each period of time as may be considered presumptive evidence of a grant. *Id.*

8. Right to draw water from spring and have pipes laid in soil of another, and to enter thereon, repair and renew same, constitutes an interest in realty, assignable, descendible and divisible; and easements growing out of it may be acquired by grant or prescription and thus become objects of title in others. *Id.*

9. Easement will become extinguished by unity of title and possession of dominant and servient estates in same person by same right; but the ownership of two estates must be co-extensive, equal in validity, quality, and all other circumstances of right. If one is held in severalty and the other only as to a fractional part thereof by the same person, there will be no extinguishment of the easement. *Id.*

WILL. See **CONFLICT OF LAWS**, 8. **CONTRACT**, 13. **EXECUTORS AND ADMINISTRATORS**, 5. **MANDAMUS**, 7. **POWER**, 1.

1. Parol evidence admitted to show that by "lot numbered six, in square four hundred and three," which testator did not own, was intended lot No. 3, in square 406, which testator did own. *Patch v. White*, 352.

2. When testator's intention appears that all after-acquired property should pass by will, conveyance of all the estate previously devised by trust deed with power of revocation which is subsequently exercised, does not revoke will. *Morey v. Schier*, 480.

3. Real estate specifically devised is not charged with general pecuniary legacy where there is nothing to show such intention. *Davenport v. Sargent*, 480.

4. Legacies, unless otherwise controlled by the will, draw interest after one year from its probate, notwithstanding that executor is unable to gather in the assets and pay the legacy within the year. *Baptist Convention v. Ladd*, 679.

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5. where there is dispute between executor and legatee as to interest due on legacy on account of delay caused by litigation for protection of the estate, an acceptance by legatee of less than amount due is an accord and satisfaction, if payment is made on condition that it shall be in full for balance due and money is accepted without protest against such condition. *Baptist Conv. v. Ladd*, 679.

6. Devise of real and personal property generally, without stating the purpose to a corporation created and existing for educational purposes alone, must be regarded as a devise for educational purposes. *Academy v. Sullivan*, 680.

7. Such a corporation is not one for pecuniary profit, merely because fees are charged for tuition; a corporation for pecuniary profit is one organized "for the pecuniary profit of its stockholders or members." *Id.*

8. By one clause of will testator devised to his wife for and during the term of her natural life, certain real estate. The reversionary interest therein was not specifically devised. By general residuary clause, he devised to his wife all the rest, residue and remainder of his estate. *Held*, that by the terms of the will and the intention of testator as gathered from the whole instrument, the wife took an estate in fee in the real estate thus devised. *Davis v. Callahan*, 680.

9. When possibility of failure of sufficient assets to meet legacies named by testator in his will, has not been anticipated and specifically provided for by him, the presumption of intended equality prevails between general legatees, as well as equality in respect to share to be borne in all deficiencies of assets. *Emery v. Batchelder*, 680.

10. In administration of testamentary assets where there is a deficiency of such assets after payment of debts, expenses and specific legacies, the loss is to be borne *pro rata* by those pecuniary legacies which are in their nature general. *Id.*

11. Annuities stand on same footing as legacies; where the estate is deficient both must abate proportionally. *Id.*

12. Bequest of sum of money to one after decease of legatee, to whom income of money is given during life, vests at once on testator's death. *Crosby v. Crosby*, 800.

13. Where testator devises property to his sons, and also property belonging to them to another, they must either relinquish their claim to their own property so devised, or to the provision made in their favor. *Ditch v. Sennot*, 800.

14. Doctrine of election does not apply where testator has but part interest in an estate which he devises; but even in such case, if it is apparent, from terms of will, that testator intended to devise whole estate, including interest of third person, then doctrine will apply to such third person if a devisee. *Id.*

15. A., by will, gave \$10,000 to B., in trust for C., for life, with remainder to children of C., if she had any, if not then to D. C. had no children. D. died in lifetime of C., leaving one child. *Held*, remainder became vested in D. immediately on death of testator, subject to be divested by birth of child to C., and that on death of C., without children, fund passed to heir-at-law of D. *Vandewalker v. Rollins*, 414.

16. The quality of property for purposes of transmission by will or inheritance is not changed from character in which testator or intestate left it, unless by some clear act he has impressed upon it definite character as money or land. When, for security of fund, money is converted into land by judicial decree, the land is substituted for fund and goes to same person who would have taken it had it remained personal estate. *Id.*

17. On question of undue influence, proponent may show that nominal legacies to heirs other than children, were inserted at suggestion of person who wrote will, because he erroneously supposed it necessary to validity of same. As to testamentary capacity, the will itself is evidence. *Whitman v. Morey*, 414.

18. Where portions of deposition are read by one party for purpose of contradicting witness who gave it, other party may read, from same deposition, so much as pertains to same subject, and tends to explain, qualify or limit what is so read. *Id.*

19. Practice of requiring executor, on issues of insanity and undue influence, to call all subscribing witnesses to will, if alive, sane and within jurisdiction, should not be departed from without good cause. *Id.*

20. Whether party shall be allowed to put leading questions to his own wit-

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nances is within discretion of presiding judge and is not matter of exception. *Whitman v. Morey*, 414.

21. Rule forbidding party to discredit his witness does not extend to case of attesting witness when, by legal intendment, he has no choice. *Id.*

22. On issues of insanity and undue influence declarations of testator tending to show state of his feelings towards relatives, to whom he gave only nominal sum, may be received. *Id.*

23. Where evidence of testator's capacity to make will was conflicting, court instructed jury that if they believed that at time will was executed testator was so diseased mentally as not to be of sound mind then their verdict should be for plaintiff. *Held*, that instruction was erroneous, as it stated rule too broadly. *Freeman v. Eurlly*, 799.

24. A person may be so diseased mentally, as not to be of sound mind, and yet possess a disposing mind, which is mental capacity to know and understand what disposition he may wish to make of his property, and upon whom he will bestow his bounty. *Id.*

25. A person capable of transacting ordinary business is capable of making a valid will. To incapacitate person from making a will, derangement or imbecility must be such as to render him incapable of understanding the effects and consequences of his acts. *Id.*

26. Realty was devised to trustee in fee to pay over income to certain *cestuis*, no time being limited. Provision was made as to one of *cestuis* that in case of his insolvency or of attachment of his equitable estate, his right to income should terminate, and his share be paid to A., B. and C., their heirs and assigns, also that trustee might, in certain contingencies, pay over to *cestui* his whole interest "in fee simple for his own use," free from all trusts. *Held*, that *cestui que trustent* took each an equitable estate in fee simple. *Greene v. Wilbur*, 616.

27. Revocation of will is not affected by death of legatees or devisees named in it; nor by marriage of testator, there being no issue of marriage; nor by alienation of larger part of his estate, which was specifically disposed of by will; nor by acquisition of other estate to amount much greater than he possessed at time will was made; nor by concurrence of all above circumstances. *Hoitt v. Hoitt*, 414.

28. Declarations of testator that he understood a will made by him was revoked, not admissible on question of revocation. *Id.*

29. Declarations of testator as to his intention in disposition of his property, not competent evidence from which to ascertain his intention as expressed in the will. *Id.*

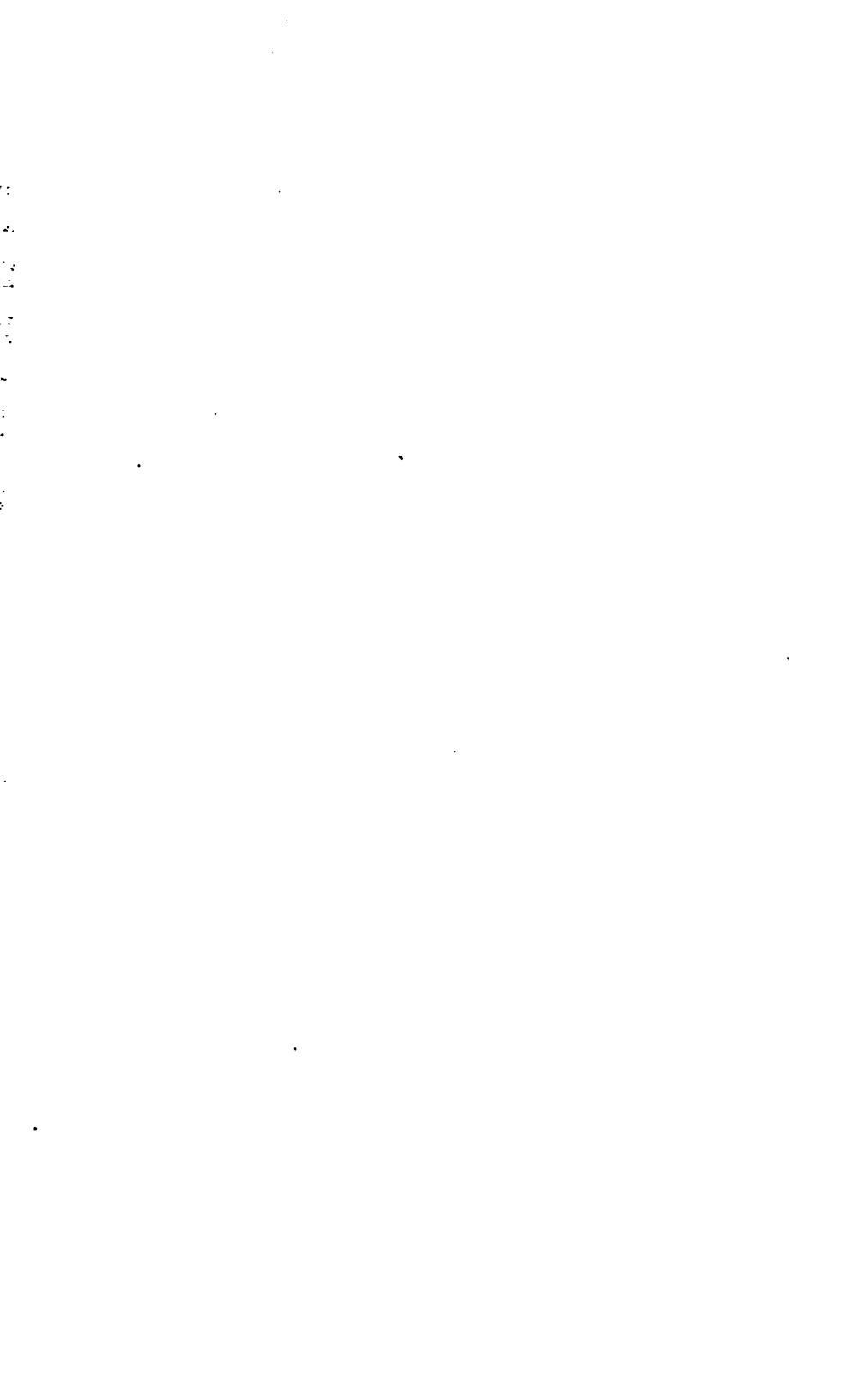
30. A. devised real and personal property to trustees to hold in trust for P., with direction to apply, from time to time, such portion, or if necessary, the whole of the income to the support of P., and upon the latter's arrival at age of eighteen, or in case of her marriage before that age, then to pay over to her the whole estate or such portion thereof as in their judgment should seem most for her benefit, leaving this matter to the discretion of the trustees. P. arrived at the age of eighteen, but trustees in exercise of their discretion withheld the payment of the principal. Upon P.'s death, *held*, that P. took a vested estate which passed to her devisees. *Weatherhead v. Stoddard*, 531.

31. No estate will be held contingent unless very decided terms of contingency are used in the will, or it is necessary in order to carry out testator's intent as therein expressed. *Id.*

32. TESTAMENTARY PROVISIONS AS AFFECTED BY THE RULES OF PRIVATE INTERNATIONAL LAW, 153.

WITNESS. See EVIDENCE, 6-9, 14, 17, 20. HABEAS CORPUS, 2.

On trial of party for larceny, after laying proper foundation, a grand juror was called to contradict one of defendant's witnesses, by testifying to his statements on oath before grand jury, which he had denied. It was objected that a grand juror could not be called as a witness to disclose what occurred before grand jury, but court held evidence proper. *Bressler v. State*, 800.



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